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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-4

In the Matter of

Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1990; Released: December 31, 1990

By the Commission: Commissioners Quello and Duggan issuing separate statements.

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I. INTRODUCTION

1. In the *Notice of Proposed Rule Making* (*Notice*) that opened this proceeding, the Commission indicated its belief that changed circumstances in the video marketplace warranted reexamination of the "three signal standard" for determining whether a cable system was subject to effective competition and thus exempt from local franchising authority rate regulation.[1] The *Notice* sought comment on a wide variety of options for a revised definition of effective competition and rate regulation standards. The resulting record leads us to believe that an effective competition standard based on three over-the-air broadcast signals is no longer valid. Thus, this *Further Notice of Proposed Rule Making* (*Further Notice*) proposes alternative tests for effective competition, and seeks comment on specific aspects of the proposals for changing the effective competition standard and standards for rate regulation.

II. BACKGROUND

2. The Cable Communications Policy Act of 1984 (Cable Act) set forth a national policy to encourage the growth and development of cable television services.[2] To further this policy, Section 623 of the Cable Act permits, but does not require, local franchising authorities to regulate basic service rates only in those situations where the cable system is not subject to "effective competition." [3] The Cable Act directed the Commission to define the circumstances in which a cable system is not subject to effective competition and to establish standards for the regulation of basic cable rates by local franchising authorities in such cases.[4]

3. Under existing Commission rules, promulgated in 1985 and amended in 1988, a cable system is deemed subject to effective competition if at least three unduplicated broadcast television signals are available over the entire cable community.[5] The existing standard counts a broadcast signal as available based on predicted Grade B coverage or "significantly viewed" status in the cable community.[6] The Commission also has established procedural requirements for those franchising authorities that choose to regulate basic cable rates, although the specific rate-setting methodology used to set the basic service rate is left to the local franchising authorities.

4. Section 623 of the Cable Act also requires that the Commission periodically review its regulations, taking into account developments in technology.[7] On January 11, 1990, the Commission initiated this proceeding to undertake such a review in light of changed circumstances in the video marketplace since the three signal standard was adopted. The *Notice* sought comment on whether the three signal standard remains valid, and, if not, what would constitute a more appropriate standard. It also requested comment on proposals to amend the standards for rate regulation by local franchising authorities in cable communities not subject to effective competition.[8]

III. DISCUSSION

A. Effective Competition

5. In the *Notice*, we indicated our belief that the three signal standard may no longer be an appropriate measure of effective competition because changes in the cable industry appeared to have altered the nature of basic cable service.[9] The fundamental change we observed was that the basic service tier, which consisted mainly of retransmitted local broadcast television signals when we adopted the effective competition standard, now includes a full range of programming services, including distant broadcast signals, cable networks, superstations and locally originated programming, beyond local broadcast stations.[10] Thus, while over-the-air broadcast signals once may have been a good substitute for basic cable service, this may not be the case today given the expanded basic tier offerings.[11] As further evidence of the possible need to revise the definition of effective competition, we noted in

the *Notice* that, under the existing standard, rates for basic cable service have increased while subscribership has also increased, a result that might suggest that competitive alternatives to basic service are limited. Moreover, an update of the staff study that was used in part to develop the three signal standard appeared to indicate that with changes in viewing patterns the current standard is no longer appropriate for determining when a cable operator is subject to effective competition.[12]

6. The *Notice* requested comment on whether the three signal standard remains valid, or whether some alternate standard would provide a more accurate determination of effective competition. Commenters favoring a revised standard were asked to consider a number of alternatives including:

> (1) an increased complement of over-the-air signals; (2) the availability of a second competitive cable system or alternative video delivery provider, such as multichannel, multipoint distribution systems (MMDS),[13] satellite master antenna systems (SMATVs), direct broadcast satellite systems (DBS) or home satellite dishes (HSDs); (3) a measure of cable penetration; (4) the offering of cable services on a per-channel or unbundled basis; and (5) some combination of factors.

1. Three Signal Standard

7. *Comments*. There is a consensus among commenters, including government parties and cable interests, that the three signal standard is no longer a viable measure of effective competition because it does not reflect today's video marketplace.[14] While the National Telecommunications and Information Administration (NTIA) and cable interests generally argue that the existing three signal standard has performed as intended,[15] they concede that an increased number of signals are now needed to constitute effective competition in today's marketplace. Rejecting our belief set forth in the *Notice* that basic cable service has fundamentally changed over this period, they argue that cable service remains a combination of local broadcast signals, regional and distant signals and a variety of cable programming services. They observe that in 1985 the Commission considered comments that indicated that basic service consisted of a mixture of local over-the-air signals and other services and rejected a standard based on nonbroadcast cable services.

8. NTIA believes that broadcast signals can exert a limiting influence on a cable system's ability to set excessive basic cable rates.[16] Cable interests state that broadcast television remains the fundamental component of basic cable service and the dominant competition to cable service, as indicated by the fact that even in cable homes the highest proportion of viewing is of local television stations.[17]

9. The National Association of Broadcasters (NAB), Association of Independent Television Stations (INTV) and commenters representing franchising authorities and alternative video delivery systems support revision of the definition of effective competition. They contend that the Cable Act was intended to maintain basic service rates at reasonable levels, either through competition or rate regulation.[18] They argue that the existing three signal standard has failed to restrain cable rates, even in areas with more than three signals.[19] NAB, INTV and commenters representing franchising authorities attribute these rate increases to a lack of competition.[20] They also contend that basic cable rates have risen at a time when penetration rates continue to grow because there are no good substitutes for cable service, which offers subscribers an array of programming and services (*i.e.*, local and distant broadcast stations, locally originated programming, satellite-delivered services and specialty channels) in one convenient package.

10. *Analysis*. We believe that our initial determination regarding the need to redefine effective competition is correct because the three over-the-air signal standard no longer provides a correct measure of effective competition to the full range of cable service. The evidence indicates that consumers subscribe to basic cable service for the large number and wide variety of programming services it delivers directly to the home. Since 1985, the number of channels included in basic service has increased.[21] Based upon the FCC/GAO data, we also find that the most widely subscribed-to tier of service on average has expanded to include significant amounts of programming beyond the retransmission of local broadcast signals.[22] Moreover, audience statistics indicate that nonbroadcast cable programming has attracted an increasing share of the audience in cable homes. For example, during the 1985/1986 television season, basic cable programming attracted a 19 share of all day audience in cable homes. During the 1988/1989 season, the all day audience share for basic cable programming rose to 28.[23]

11. Furthermore, an analysis of the services provided by cable television systems indicates that such services can be divided into four general categories and that different media, to varying degrees, provide competition for different components of cable service.[24] First, because cable can offer a high level of signal quality, it serves as an "antenna service," delivering quality reception of retransmitted local broadcast signals. The availability of comparable off-air broadcast television service is a good substitute for cable's "antenna service" function. Second, cable offers "premium" programming, such as recent movies, usually without commercial interruption. The substantial penetration of VCRs and the ubiquity of tape rental stores provides a good substitute for commercial-free movie channels.[25] Third, cable offers general interest channels, such as USA Network and Turner Network Television (TNT). Broadcast signals offer some degree of competition to these (typically basic tier) channels which offer programmming often similar to that of independent broadcast stations.[26] The wide array of specialized cable services like CNN, ESPN, MTV, Nickelodeon, BET and C-SPAN,[27] constitutes the fourth service category.[28] Although much of such programming is available on broadcast television to some extent, especially in markets with large numbers of stations,[29] such programming is not available over-the-air on a full-time basis as it tends to be on cable (*e.g.*, CNN Headline News offers a national newscast, similar to the broadcast networks nightly news, every half hour, 24 hours per day).[30] In fact, cable offers such a unique cluster of a wide array of programming services that a small number of broadcast signals alone generally cannot deliver comparable service. In sum, it is clear that the three signal standard no longer reflects effective competition to the full range of cable television service.

2. Alternative Effective Competition Standards

12. *Comments*. Commenters unanimously supported a revised effective competition standard and addressed the various alternatives proposed in the *Notice*. The first alternative on which we sought comment in the *Notice* is whether a larger complement of over-the-air broadcast signals would be a better measure of effective competition than the existing three signal standard. The National Cable Television Association (NCTA) proposes a five signal standard that is supported by many cable operators.[31] NCTA states that a five signal standard now may be appropriate because there have been changes in the relative attractiveness to consumers of the services carried on basic tiers vis-a-vis broadcast programming. NTIA believes that a six signal standard would be appropriate[32] in order "to ensure basic cable rates remain at reasonable, if not fully competitive, levels."[33]

13. NAB, INTV, franchising authorities and competing media providers support a revised effective competition standard based on the availability of an independently owned and operated competing multichannel video program service that offers consumers comparable programming at a price comparable to that of the incumbent cable company. Specifically, several parties believe that the standard should include criteria to indicate when the alternative will be considered truly a competitor. Some commenters support the proposal NYC/NLC submitted in MM Docket No. 89-600 to define effective competition as the availability to 80 percent of the cable community of another multichannel video system that has a 30 percent penetration rate. Other commenters recommend that the competing system be required to provide a minimum number of channels and the same broad categories of programming service as the existing cable system at a comparable price.

14. The *Notice* also asked whether cable penetration might be a measure of effective competition. Parties representing cable interests addressing this matter argue that high penetration resulting from market power cannot be distinguished from that achieved by provision of highly desired services in a competitive market. Cable operators contend that cable penetration depends upon a number of factors, including quality of over-the-air signals, attractiveness of cable programming, marketing skills of the cable operator, overall quality of cable service and its price. On the other hand, a few commenters representing franchising interests believe that at some level cable penetration may indicate market power and that it should be a component of the effective competition standard.

15. In the *Notice*, we asked whether we should find that effective competition exists if all subscribers in a cable community can purchase cable service on a per-channel or unbundled basis. While a few commenters indicate that there would be benefits, such as increased consumer choice, if cable programming were offered in an unbundled manner, no commenter believed that an unbundled service offering would constitute effective competition. Parties contend that "a la carte" or unbundled cable service offerings are simply a repackaging of programming. Cable interests indicate that such a requirement is technically infeasible and, to the extent it is possible, would cost a prohibitive amount.[34] They also claim that unbundling would cost the consumer more because the fixed costs of providing cable to each customer are essentially the same whether subscribers choose a single channel or a package.

16. We also sought comment on whether we should adopt an effective competition standard that combines two or more alternatives, including proposals originally submitted in 1985 by the Department of Justice (DOJ) and the National League of Cities. Cable interests generally opposed a combination standard. They assert that consideration of multiple factors within the cable community would be complicated and that Congress specifically directed the Commission to choose a standard that is simple and easily applicable on a community-by-community basis.[35]

17. Franchising authorities generally support a standard that includes a measure of the availability of alternative delivery systems and a market share test based on cable penetration. In this regard, NYC/NLC presents a specific proposal that effective competition be defined as existing only where (1) the local cable system has a penetration rate of less than 30 percent, or (2) at least two non-affiliated providers of comparable multichannel video programming are present in the community, each of which (a) offers service to at least 80 percent of households in the franchise area and (b) actually provides service to at least 30 percent of households in the area.[36] Other commenters propose multiple-part definitions of effective competition that include factors for the number of over-the-air broadcast signals, the availability of alternative video providers and penetration rate.

18. In reply comments, the Department of Justice (DOJ) proposes a multipart effective competition standard. In DOJ's view, a measure of effective competition should take into account a variety of factors including the number and nature of local over-the-air broadcast signals, the quality of broadcast reception and the number and nature of nonbroadcast services offered as part of the basic service tier. Specifically, DOJ proposes that effective competition be presumed to exist when all or the majority of the following criteria are met: (1) a significant number of broadcast signals can be received in the area; (2) the ratio of the number of channels on the cable system's basic tier to the number of over-the-air broadcast signals is below a specified number; and (3) the number of subscribers purchasing only basic service comprise less than a specified percentage of the total number of subscribers.[37]

19. *Analysis*. After reviewing the record in this proceeding, we believe that there are a number of ways to measure effective competition and that no one factor, taken in isolation, can necessarily measure the existence or lack of effective competition. As explained above, cable market power may be derived from a variety of sources whose influence varies because of different local circumstances.[38] Thus, we believe that a revised standard must set forth a number of alternative conditions, any one of which can be presumed to indicate the presence of effective competition.[39] In order to minimize unnecessary regulatory constraints upon cable operators that have not abused their market power, moreover, we propose among these a behavioral test for effective competition. Accordingly, we propose that effective competition would be presumed to exist if any of the following conditions are met: 1) six unduplicated over-the-air broadcast television signals are available in the cable community and cable penetration is below 50 percent; 2) an independently owned, competing multichannel video delivery system is available to 50 percent of the homes passed by the incumbent cable system and subscribed to by at least 10 percent of the homes passed; or, 3) a behavioral test which would find a

cable system subject to effective competition if it (a) offers a basic tier of service at a rate, and perhaps in a quantity, comparable to that offered in other communities where effective competition is found to exist or where rates otherwise appear to have been held to a reasonable competitive level, and (b) meets specified customer service standards.[40]

20. The goal of this proposed standard is to strike an optimal balance between our desire to minimize regulation and our concern that cable systems may be able to exert undue market power in the absence of substitutable services. We believe that this multiple-option test for effective competition is superior to any single criterion because it would consider the source and extent of a cable system's market power, which may vary from market to market, as well as the components of cable service described above. For this reason, we propose the alternative structural conditions (numbers one and two above) which we believe reflect effective competition to a cable system. Moreover, to account for the cumulative price disciplining effect of competitive factors not captured within those structural standards, we propose a behavioral test whereby cable systems offering a competitively priced basic service will be presumed to be subject to effective competition. While comments in this proceeding discuss major aspects of the proposed revised standard, we believe that it is necessary to seek further comment on the specific details of our proposed standard.

21. *Six Signal, Under 50 Percent Penetration Test.* The first alternative criterion would require that at least six unduplicated over-the-air broadcast signals be available in the cable community in combination with a cable penetration of less than 50 percent.[41] We seek the presence of a number of over-the-air signals adequate to ensure that competitive choices are present and sufficient in quantity, diversity and price to force cable system operators to function in a competitive manner. As the number of "*free*" broadcast signals in a market increases, these signals may increasingly become an effective consumer alternative to the diversity of service available from cable on a *paid* basis.[42]

22. Moreover, the evidence before us indicates that some number of broadcast signals exerts a downward pressure on cable rates, although the precise "right" number cannot be precisely identified on the basis of the studies submitted into the record of this proceeding.[43] Our selection of six over-the-air signals is based on NTIA's analysis and estimate[44] and is intended to be conservative enough to ensure a complement of signals clearly adequate to provide effective competition to the range of services offered by cable television service.

23. We are aware that consumers with individual antennas may not in fact enjoy good reception from the signals that are "technically" available in some communities (*e.g.*, Manhattan, New York). Thus, we believe that an effective competition standard based solely on the number of off-air signals may not adequately address the "antenna service" source of cable market power in such cities. Therefore, we believe it is appropriate to consider signal availability in conjunction with low cable penetration in the franchise area. This second criterion will provide evidence that consumers can actually receive those over-the-air signals and will support the inference that, by and large, these signals provide adequate substitutes for the more specialized cable services. At the same time, however, we request comment on whether it might be appropriate to consider a six signal standard *without* the additional requirement that there be low cable penetration in the market. While there is no definitive cable penetration number that can ensure the existence of effective competition, we believe that cable market power is likely to be restrained in markets where six or more over-the-air signals exist and cable penetration is less than 50 percent.[45] In a market where a majority of the homes passed by cable choose not to subscribe to the service (*i.e.*, cable penetration is less than 50 percent), it would appear that there are sufficient alternatives to the antenna function and programming services provided by the cable operator. Moreover, by using a penetration test of below a low benchmark as opposed to above a high benchmark, it is unlikely that perverse incentives will cause cable systems to hold penetration down just to escape regulation, given the economic advantages to the cable system of increasing penetration. We ask commenters to consider whether the 50 percent criterion is approporiate for this penetration test or whether some alternative measure, higher or lower, would provide a better indication that substitutes to cable are available.[46]

24. We propose to retain the existing procedures for determining whether a broadcast television signal is available over-the-air in a cable community. Thus, under our proposed standard, the entire cable community would have to be served by at least six unduplicated broadcast signals and a signal would be counted on the basis of its predicted Grade B contour, or its being significantly viewed in the cable community.[47] We will define cable penetration as the number of subscribers divided by the number of homes passed and then expressed as a percentage.[48] We propose that parties be allowed to use the data available from publicly available sources, obtained from the cable operator directly, or from specifically undertaken audits of cable subscribers to determine the cable penetration of the local cable system.[49]

25. *Multichannel Competitor Test.* Another alternative condition under which we believe that effective competition will be found to exist is if a competing, independently owned,[50] multichannel video delivery service operates in the cable community. We must determine if a rival is, in fact, a "competing multichannel video service" and if it is sufficiently "available" to the community. This alternative will require that at least 50 percent of the homes passed by the incumbent cable system be capable of receiving the alternative services. We believe that an availability criterion of at least 50 percent is sufficient to indicate that an alternative really exists in the cable community and will result in pro-consumer competitive responses by incumbent cable operators. We also believe that a penetration criterion set at 10 percent or more demonstrates that an alternative video provider offers service that consumers view as a substitute for the incumbent cable television system.[51]

26. A number of different video delivery services, including a second competitive cable system, wireless cable, SMATVs, home satellite dish service (HSDs) and, in the future, DBS may provide alternatives to the incumbent cable operator. For a second cable system, we propose that its availability be determined by calculating the percentage of homes passed by the incumbent cable system that are also passed by the second competitive cable system.[52] The penetration of a second competitive cable system would be defined by dividing the number of subscribers to that system by the number of homes it passes

and expressed as a percentage. We propose that parties obtain data for the availability and penetration of the alternative video delivery services from publicly available sources, from the operator directly or from specifically undertaken audits. The availability and penetration figures for other multichannel distribution systems would be calculated similarly.[53]

27. Moreover, within a given franchise area, the cable system may compete with one or more rivals. When this is the case, to determine the availability of competing video services, we propose that the number of homes passed by one or more of these systems be added together to calculate the proportion of the incumbent cable system's service area that are served by all competing services combined. Similarly, we propose that the penetration of such video delivery services be determined by combining the number of subscribers to all available services and calculating the penetration on the basis of home passed by all the competing systems combined.[54]

28. Under these criteria, segments of the cable franchise area, including up to 50 percent of the households, could be without a multichannel alternative and yet not be subject to protection by local regulation. In such a case, the cable operator might consider reducing its prices only in the area where it faced competition. However, under Section 623(f) of the Cable Act, a franchising authority may prohibit "discrimination among customers of basic cable service," even when it has no authority to regulate rates. Since local authorities have the power to prevent such discrimination by requiring geographically uniform rates, we believe that the proposed availability criteria would not leave unprotected those cable customers unable to subscribe to the other service.

29. *Competitive Behavior Test.* We recognize that our structural tests for effective competition may not capture or reflect all competitive forces that, taken together, have a price disciplining effect on cable services. While we seek to restrain the pricing of basic cable service where effective competition is not apparent, we also are intent on minimizing unnecessary regulatory burdens on cable systems. Therefore, we believe that consumer interests in receiving cable service at reasonable rates can be protected without direct rate regulation by using a behavioral test for effective competition in addition to the structural tests identified above. This behavioral standard would test whether the cable operator provides a basic service tier at a competitive price level as well as a minimum level of customer service. Thus, we would ensure that unnecessary regulation is avoided in those situations where cable system rates are in fact demonstrably restrained by a combination of market conditions not identified by either of our structural standards. In addition, we propose requiring cable systems to certify to their local franchising authorities that they meet certain customer service standards to qualify under this test. This latter requirement recognizes that competition is likely to result in improved customer service since unsatisfactory service drives subscribers to competitive alternatives. It will also provide evidence that the cable system is not degrading the quality of service to its subscribers in order to reduce its rates.[55] We particularly request that commenters address this behavioral test, as it was not previously presented in this proceeding.

30. Under the first part of this behavioral test, a cable system would be deemed to be subject to effective competition, whatever the source, if it offered a basic tier of service corresponding in rates, and perhaps in quantity, to those in communities where effective competition is readily apparent. In order to implement this proposal, we must specify the relevant pricing and, perhaps, complement of signals. If we were to establish national standards, we believe that the most appropriate benchmarks for this competitive tier should be determined by analyzing basic cable service in communities subject to effective competition under our new structural tests.[56] As this information will not be available until some time after the new standard becomes effective, however, we propose alternative transitional behavioral standards.

31. One possible method for determining transitional benchmarks would be to specify a minimum number of channels and a maximum aggregate price for the basic tier. This would ensure that cable subscribers receive a reasonable amount of programming at a competitive price. One approach would be to base this standard on each cable system's pre-deregulation number of channels and pre-deregulation price adjusted to reflect inflation.[57] Alternatively, we might establish a single national benchmark for this competitive package. For example, these benchmarks could be based on the number of basic service channels and the price of basic service offered by the median cable system in the sample of the FCC/GAO rate study. Thus, based on the December 31, 1989, data from the FCC/GAO survey, a cable system offering 23 or more separate channels at or below $16.45 would be considered to provide a competitive package of basic service.[58] Alternatively, we could base the transitional benchmark on the average number of channels on the lowest price basic tier on November 30, 1986, the eve of deregulation (*i.e.*, 18 channels),[59] or 80 percent of channel capacity, whichever is lower.[60] Under this proposal, the benchmark price would be based on the average per-channel basic service rate of the lowest price basic tier rate on November 30, 1986 (*i.e.*, $0.57) adjusted to reflect the inflation that has occurred in the past four years. The adjustment factor could be the statutorily permitted five percent annual rate increase[61] or some measure of the rate of general inflation, such as the Consumer Price Index (CPI).[62] For example, if we applied the CPI to the base per-channel rate of $0.57,[63] then the adjusted per-channel rate from November 30, 1986, would be $0.64 in November 1989.[64] Thus, a cable system that offered a "competitive package" of at least 18 separate channels at or below $11.52 (*i.e.*, 18 x $0.64) in November 1989 would have been presumed to face effective competition.[65]

32. A second general approach for a transitional standard would be to set a maximum per channel price for the basic cable service without specifying any minimum number of channels that cable operators must include in their basic service. This proposal would minimize interference with the cable operator's flexibility to offer the type of basic service, whether a very large tier or a smaller, more "universal service"-type tier, that best meets the consumer demand in its local community. Thus, this proposal would not constrain a cable operator's tiering decisions in a way that could artificially increase the price of basic service where consumers might want a small, "universal service" option. As in the proposal above, the average price per channel could be based either on the median system's 1989 price adjusted for inflation or on each system's pre-deregulation average price per channel adjusted for inflation.

33. We also seek comment on possible modifications to our second general approach that would specify more than simply a maximum per-channel price. For example, in order to ensure that basic cable service is available to consumers at a reasonable price, we could specify in addition a maximum aggregate price that would exclude operators offering a basic tier with so many channels that, while reasonable on a price-per-channel basis, would cost more than subscribers could be reasonably expected to pay for such service.[66] We could also consider a basic tier service floor to ensure that a system meeting our behavioral standard carries, even if not an average number of basic channels, at least a minimum level set at, *e.g.*, 10 channels. Alternatively, a similar approach would be to identify a range, or band, of the number of channels to be provided in order to eliminate the need for annual floor and/or ceiling price adjustments. While placing some constraints on the cable operator's ability to establish a basic service tier, this proposal provides more flexibility than a proposal setting specific benchmarks for the number of channels and price of basic service.

34. Under any of our behavioral standard approaches, we would propose to permit cable operators to raise the price of their basic tier each year by an amount not to exceed five percent or, if greater, the annual CPI. As a general matter, we also seek comment on the appropriateness of the CPI as a reliable measure of cable industry costs or whether, instead, an alternative index would be more accurate.

35. We are concerned that any of our behavioral options could create an incentive for cable operators to carry large numbers of low-cost or revenue producing channels (*e.g.*, home shopping channels) resulting in a skewing of the basic tier package. We therefore seek comment on whether this might indeed be a problem and, if so, how we could mitigate its effect.

36. Under the second part of this behavioral test, the cable system would have to certify to the local franchising authority, on an annual basis, that it has fully complied with specific customer service standards. We propose using NCTA's voluntary customer service standards, set forth in Appendix D, [67] as the basis for this requirement and thus seek comment on the appropriateness of each of these guidelines. These standards establish a minimum level of customer service in three main areas: office and telephone availability; installations, outages and service calls; and communications, bills and refunds. We view this certification process as an additional verification of the competitive checks faced by the cable system and, thus, as a way to ensure that cable systems are not merely lowering their rates at the expense of providing adequate service to its customers. Moreover, this requirement may help to rectify two problems we identified in our recent Cable *Report*: that a general pattern of problems with customer service has emerged since passage of the Cable Act, and that at present franchising authorities may lack adequate enforcement mechanisms to compel cable operators to ensure reasonable service to the public.[68]

B. Standards for Rate Regulation

37. The Cable Act also requires the Commission to establish standards for the regulation of basic cable service rates by local franchising authorities whenever the cable system does not face effective competition.[69] The current rules impose procedural requirements upon franchising authorities exercising their right to regulate basic rates. Franchising authorities must give: (1) formal notice to the public; (2) opportunities for interested parties to make their views known; and (3) a formal statement to the public, including a summary explanation, when a decision on a rate matter is made.[70] In the *Notice*, we proposed to retain these procedural requirements. We seek comment on whether additional procedural requirements are warranted.

38. At the present time, the Commission has no established substantive standards to guide local franchising authorities in their regulation of basic cable rates.[71] In the *Notice*, we requested comment on a number of proposals related to the regulation of rates. In particular, we requested comment on the possibility of adopting a specific rate-setting methodology, such as price caps, to be used by local franchising authorities for setting basic service rates.

39. *Comments*. Commenters representing franchising authorities generally favor our continuing to allow each franchising authority to determine regulated rates. They contend that it was Congress' intent that such decisions be left to local authorities who are in the best position to assess local circumstances. Parties also concur with the Commission's conclusions that rate of return regulation is administratively cumbersome and would not assure that subscribers are charged reasonable rates. Moreover, they oppose price cap regulation because it cannot easily respond to unusual or changing local circumstances and does not necessarily assure reasonable rates. However, commenters would welcome FCC guidance to assist local authorities in regulating rates.

40. The Department of Justice, in its reply comments in MM Docket No. 89-600, observes that cable systems serving different local markets vary greatly and that uniform national policies may have clear disadvantages. DOJ comments that the costs imposed on the cable industry by differing local policies do not necessarily affect cable systems in other localities.[72]

41. Cable interests allege that franchising authorities have abused their rate regulation authority in the past by not approving justified rate increases in an attempt to keep prices low, by basing decisions on local political considerations, by delaying decisions and by using rate regulation to obtain unrelated concessions from cable operators. These parties also contend that many communities lack the expertise and resources needed to regulate rates in a reasonable manner. While most of these commenters support the adoption of rate-making standards, they also concur with the Commission's conclusion regarding rate of return regulation. With respect to price caps, several cable commenters argue that such methodology does not fit easily into the cable environment and would pose administrative difficulties for franchising authorities.

42. Several cable commenters argue that the Commission lacks the authority to impose rate of return regulation or incentive based rate-setting standards, such as price caps. These commenters assert that Section 623(a) of the Cable Act limits the Commission's authority to impose standards that directly regulate the amount of the rate increase.[73] A number of commenters contend that rate of return regulation also is precluded by Section 621(c) of the Cable Act, which prohibits regulation of a cable system as a common carrier or utility by reason of providing cable service.[74] Some commenters also believe that this prohibition may apply, on due process grounds, to price caps if its application were confiscatory in nature.

43. NTIA, the principal proponent of price caps, believes that a flexible application of this methodology to the cable industry would be within the Commission's authority to regulate cable rates. NTIA recommends use of a simplified price cap scheme by non-federal authorities for regulating basic cable service rates. Under this approach, the initial (or base) rate would be the price for basic service on January 22, 1990, the release date of the *Notice*. Subsequently, cable operators would be able to adjust regulated basic rates annually to reflect changes in an index (the cost index) tied to the cost of providing service. In cases where the cable system restructures its basic service offering, NTIA further proposes to permit the local franchising authorities to set the initial rate to avoid subscriber rates that are based on services other than those actually being provided.

44. *Analysis*. The Cable Act gives the Commission considerable flexibility in setting substantive standards for use by local franchising authorities in their regulation of basic cable service rates. We believe it appropriate and consistent with prevailing precedent in this area that, in setting or approving rates, franchising authorities take into account costs including direct capital costs, programming, labor, and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, increases in such costs, and the cost of any franchise-imposed requirements not directly related to the provision of cable service, as well as a reasonable profit. At the same time, because each cable system operates under its own franchise agreement and is subject to different costs depending, in part, on the provisions of that franchise agreement, we believe an approach that relies generally on municipalities to determine or approve specific rates is appropriate. Therefore, we seek comment on our proposed standard whereby franchising authorities, in regulating basic cable rates in the absence of effective competition, shall allow a fair return taking into account, at a minimum, the specific factors set forth above.[75] To the extent disputes arise with respect to whether the franchising authority has appropriately applied the standard, our preference is that such disputes should be resolved in the courts. We seek comment on whether such disputes should or can be resolved in the courts. *See, e.g.*, 47 U.S.C. § 555.

45. We also note that cable operators are permitted to alter their program offerings. Section 625(c), relating to the modification of franchising agreements, permits a cable operator to rearrange, replace or remove a particular cable service it has agreed in its franchise agreement to carry only if the service becomes unavailable or is available only at substantially higher copyright fees for which the operator has not been compensated. Section 625(d) states that "a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such action are not subject to regulation under section 623." Moreover, the legislative history of subsection (d) suggests that, in the context of modifying franchise requirements, a cable operator may "move a cable service from one tier to another if neither tier is subject to rate regulation under this Act." *See House Report* at 72. Thus, we believe that the Cable Act permits cable operators to move a service from one tier to another if: 1) the service is not required in their franchise agreement; or 2) even if the service is required by the franchise agreement, the tiers involved are not subject to rate regulation.

C. Implementation of the Rules

46. We also seek comment on issues relating to the implementation of the proposed effective competition standard. In the *Notice*, we proposed that franchising authorities be delegated in the first instance the authority to determine whether a cable system meets the new effective competition standard adopted as a result of this proceeding. We also stated that if we modified the existing effective competition standard, it may not always be readily apparent whether a cable system is subject to effective competition. We sought comment on a proposal to retain Section 76.33(c) of the rules, which permits any party seeking to establish either the presence or absence of effective competition to petition the Commission in accordance with the provisions and procedures set forth in Section 76.7 on special relief.[76] We now seek additional comment on the implementation of rate regulation in situations where changes in market conditions affect the status of a cable system with respect to the effective competition standard. On the basis of the record before us and our analysis, we have tentatively determined the manner in which a revised effective competition standard should be implemented and seek comment on the proposals specified below.

47. *Comments*. Most commenters, representing a variety of interests, generally support procedures that would permit the initial determination of effective competition to reside with the local franchising authority, with either the cable operator or the franchising authority having the opportunity to request Commission review of the decision. They state that it is efficient to allow the franchising authority to make the initial decision, and the right of appeal would allow due process and ensure fairness. On the other hand, Navy Broadcasting Service recommends that it be assumed that effective competition does not exist in any market and that the burden of proof be placed on the cable operator, the party with the most to gain, to demonstrate its existence.

48. *Analysis*. We note the general support of most commenting parties, including cable operators and franchising authorities, for the proposal to delegate to the franchising authority the responsibility for the initial determination of whether the effective competition standard is met in its community. We find that this is a logical approach to deciding when cable rate regulation is permitted in a community. Under the Cable Act, franchising authorities have the option of regulating rates when effective competition does not exist. Thus, if a franchising authority chooses not to regulate basic service rates, there is no need to determine whether effective competition exists. Where a franchising authority is interested in regulating rates, then it would appear appropriate for this body to determine whether the cable system meets the effective competition standard. Accordingly, we continue to believe that, as proposed in the *Notice*, the local franchising authority should be delegated the responsibility for the initial determination regarding the existence or absence of effective competition. Parties, however, may wish to provide additional comments on this issue.

49. Once a franchising authority applying the proposed effective competition standard determines that the cable system in its community does not face effective competi-

tion, we foresee several possible outcomes: (1) the cable operator agrees with the franchising authority and the rate regulation process is set in motion; (2) a cable system which does not meet any of the structural alternatives of the proposed standard modifies its service offering to meet the "behavioral standard" alternative; or (3) the matter cannot be resolved at the local level and Commission review is necessary.

50. Where the cable operator and the franchising authority cannot agree whether the system is subject to effective competition, the provisions of Section 76.33(c) of the rules and the existing special relief procedures specified in Section 76.7 would permit the parties to bring the dispute before the Commission. We have found these procedures workable, and commenters agree with this assessment. Therefore, we believe that the existing procedures for resolving such disputes between cable systems and franchising authorities should be retained.

51. The Commission previously set forth standards for waivers of the *prima facie* showing of the existence of broadcast signals required under the effective competition standard.[77] We propose to retain these requirements for waiver showings where the number of over-the-air broadcast signals is a component of the effective competition criterion at issue. We request comment on this proposal.

52. A franchising authority seeking to rebut the cable penetration estimate may submit to the Commission counter evidence based on a survey of cable households passed and cable subscribers. Cable operators may refute penetration figures indicated in publicly available sources by submitting more recent data. Franchising authorities or cable operators disputing the availability or penetration information provided by the alternative media providers may submit additional information for our review.[78]

53. We now seek comment regarding procedures to govern the application of any revised rules in situations where changes in market conditions after the initial determination affect whether a cable system is subject to effective competition. When a system, initially subject to effective competition, no longer faces effective competition, we propose to allow a transition period of six months.[79] Under this proposal, a cable system would not be subject to rate regulation during the first six months following a change in market (*i.e.*, structural) conditions that would cause it to no longer face effective competition.[80] However, when a cable system that is deemed subject to effective competition on the basis of the behavioral test changes its basic service offering such that it no longer meets that standard, we propose no transition period since the changed circumstance is at the discretion of the cable operator. Alternatively, where a cable system initially does not face effective competition and its basic cable service rates are regulated, we propose that such rate regulation should cease immediately upon discovery that changed circumstances cause the system to meet one of the conditions of the effective competition standard. We further propose that in instances where the cable system and franchising authority disagree regarding the changed situation, the *status quo* be maintained until the matter is resolved either by the parties or the Commission. We seek comment on these proposals and the specific terms by which they could be implemented.

D. Others Matters

54. We also solicit comment on the relationship, if any, between the rules governing effective competition and the absence of signal carriage regulations. The existing regulatory environment was created at a time when signal carriage obligations were in place. Thus, signal carriage requirements are referenced in certain provisions of the Cable Act. For example, the Cable Act defines the basic tier as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522(2). In addition, Congress assumed the existence of signal carriage obligations in the definition of the basic tier:

> "Basic cable service" means any service tier which includes the retransmission of local television broadcast signals, as currently required under the Commission's "must carry" rules, 47 CFR 76.51 *et seq.* or, if such regulation change, local television broadcast signals comparable to those now specified by such regulations in the FCC must carry rules.

See House Report at 40. Moreover, Section 624(f) of the Cable Act implicitly recognized the existence of basic signal carriage obligations. 47 U.S.C. 544(f). Accordingly, we solicit comment on whether signal carriage obligations should be included as part of our effective competition standard and, if so, how.

IV. CONCLUSION

55. We believe that the existing three signal effective competition standard no longer reflects the realities of today's cable industry or video marketplace. We believe that the standard should be modified to take into consideration the possible sources of cable market power. We propose that a cable system be found to face effective competition if it meets any one of several alternative tests. We propose alternative structural standards for determining whether a cable system faces effective competition in its local franchise area. We also propose a behavioral test that will indicate whether a cable operator offers a package of basic tier services corresponding to those in communities where competition is readily apparent and whether its service meets specific customer service standards. We seek comment on the proposed effective competition standard which, in our view, balances our desire to minimize unnecessary regulatory burdens against the concern that local cable systems can exert undue market power to the detriment of consumers. Finally, we propose a standard for rate regulation, in the absence of effective competition, pursuant to which franchising authorities shall allow cable operators a fair return taking into account appropriate costs. Therefore, we seek comment on the proposals set forth in this *Further Notice of Proposed Rule Making*.

V. ADMINISTRATIVE MATTERS

56. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on

the rest of the *Further Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Further Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

57. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified requirement or burden upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

58. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

59. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

60. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

61. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 31, 1991, and reply comments on or before February 15, 1991. Extensions of these dates are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

62. Authority for this action is contained in Sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended.

63. For further information on this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

Initial Comments

1. CMI Research, Inc.
2. Pacific West Cable Television
3. InterMedia Partners and InterMedia Partners II, L.P.
4. VideoProbeIndex, Inc.
5. ESPN, Inc.
6. Flat Rock Cable Communications Commission
7. Contra Costa County
8. Competitive Cable Association
9. Time Warner Inc.
10. National Association of Broadcasters
11. Consumer Federation of America and Telecommunications Research and Action Center
12. Association of Independent Television Stations, Inc.
13. Alliance of Small Cable System Operators
14. Continental Cablevision, Inc.

15. Tele-Communications, Inc.
16. Adelphia Communications Corporation, Arizona Cable Television Association, Coaxial Communications, Falcon Cable TV, Hauser Communications, Inc., National Cable Communications, Inc., Pennsylvania Cable Television Association, Prestige Cable TV, Inc., Star Cable Company, Tele-Media Corporation, Whitcom Investment Company
17. Southwest Missouri Cable TV, Inc.
18. National Satellite Programming Network, Inc., Beach Communications, Inc., Mid-Atlantic Communications, Inc., Stellar Communications, Inc., Telecom Satellite Systems Corp., Telesat Cablevision, Inc., and 21st Century Technology Group, Inc.
19. Community Antenna Television Association, Inc.
20. Turner Broadcasting System, Inc.
21. USA Network
22. Mid-America Cable Television Association, Inc.
23. National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., Maxtel Cablevision, Millisat Incorporated, NuMarket Cable Systems, Inc., Pacific Cablevision, Western Cable Communications, Inc.
24. Heritage Communications, Inc.
25. North Coast Cable
26. Arkansas Public Service Commission
27. New York State Consumer Protection Board
28. Public Service Commission of the District of Columbia
29. City of Dubuque, Iowa, Montgomery County, Maryland, and the City of St. Louis, Missouri
30. City of New York, The National League of Cities, and the United States Conference of Mayors
31. City of Ithaca, New York
32. State of Hawaii
33. Village of New Paltz, New York
34. Northwest Municipal Cable Council
35. Cablevision Systems Corporation
36. Newhouse Broadcasting Corporation
37. National Telecommunications and Information Administration
38. United States Catholic Conference
39. City of El Paso, Texas
40. City of Tucson, Arizona
41. Richard S. Leghorn
42. Massachusetts Community Antenna Television Commission
43. B.F. Investments, Inc.
44. Cablevision Industries Corporation, Comcast Corporation, Cox Cable Communications, Providence Journal Company, Sammons Communications, Inc., Summit Communications Group, Inc.
45. Multi-Micro, Inc.
46. National Rural Telecommunication Cooperative
47. Armstrong Utilities, Inc.
48. National Cable Television Association, Inc.
49. USA Cablesystems Inc.
50. Cable Television Operators and Associations
51. Motion Picture Association of America, Inc.
52. Channel America LPTV Holdings, Inc.
53. BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company
54. Wireless Cable Association, Inc.
55. Carol L. Bennefield
56. WXON-TV Inc.
57. Navy Broadcasting Service
58. City of Beverly Hills, California

Reply Comments

1. City of Boston
2. Richard S. Leghorn
3. Tele-Communications, Inc.
4. National Telecommunications and Information Administration
5. Cable Television Operators and Associations
6. Association of Independent Television Stations, Inc.
7. National Association of Broadcasters
8. Scientific-Atlanta
9. United States Department of Justice
10. Mission Cable Company, L.P.
11. Montgomery County, Maryland
12. United States Telephone Association
13. City of New York, the National League of Cities and the United States Conference of Mayors
14. Mid-America Cable Television Association, Inc.
15. United Cable Television of Mid-Michigan, Inc.
16. USA Cablesystems Inc.
17. National Cable Television Association, Inc.
18. Ramsey/Washington Counties Suburban Cable Commission
19. National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., Maxtel Cablevision, Millisat Incorporated, NuMarket Cable Systems, Inc., Pacific Cablevision and Western Cable Communications, Inc.
20. Consumer Federation of America and Telecommunications Research Action Center
21. GTE Telephone Companies
22. BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company
23. Cablevision Systems Corporation
24. Family Entertainment, Inc.
25. Time Warner Inc.

26. Cox Enterprises, Inc.
27. General Instrument Corporation
28. USA Network and the Nashville Network
29. National Telephone Cooperative Association
30. The Weather Channel and Black Entertainment Television
31. Susquehanna Cable Co.
32. Westfield News Advertiser, Inc.
33. New York State Commission on Cable Television
34. C-TEC Cable Systems
35. Arts & Entertainment Cable Network
36. National Telephone Cooperative Association

APPENDIX B

Initial Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action*. The Cable Communications Policy Act of 1984 requires the Commission to periodically review its rules regarding the regulation of basic cable service rates. An analysis of changes in the video marketplace since these rules were adopted in 1985 led us to adopt the *Notice of Proposed Rule Making* (*Notice*) in this proceeding in order to reexamine the "effective competition" standard and standards for rate regulation and to consider revisions to them. The *Notice* raised a wide variety of alternatives for the regulation of basic service rates. Based on the comments receive in response to the *Notice*, we now seek comment on more specific proposals.

II. *Objectives*. To consider alternative definitions for "effective competition" and modifications to the standards for rate regulation to ensure that local franchising authorities are permitted to regulate basic cable rates in situations where a cable system has significant market power. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize any unnecessary regulatory burden on affected parties.

III. *Legal basis*. Action as proposed for this rule making is contained in Sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected*. The proposed effective competition standard is likely to subject additional cable television systems to rate regulation of their basic cable service by their franchising authorities. However, as these cable systems may or may not be rate regulated, at the discretion of the franchising authority, we are unable to estimate the number of cable systems that would be affected by any of the proposals discussed in the *Further Notice of Proposed Rule Making*.

V. *Reporting, record keeping and other compliance requirements:* The proposals under consideration in this *Further Notice of Proposed Rule Making* include the possibility of new reporting and record keeping requirements for cable systems.

VI. *Federal rules which overlap, duplicate or conflict with this rule*: None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives*: In response to the initial regulatory flexibility analysis included in the *Notice*, Southwest Missouri Cable TV, the only commenter to directly address the Initial Regulatory Flexibility Act analysis, and a number of other small cable operators requested that any new standards exempt small cable systems (*e.g.*, less than 1000 subscribers) from rate regulation even when effective competition does not exist. Before adopting any new rules, we will evaluate the impact on small systems and give due consideration to this proposal.

APPENDIX C

Proposed Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. Section 76.33 is proposed to be amended by revising paragraph (a) to read as follows:

§ 76.33 Standards for rate regulation.

(a) Effective _____, a franchising authority may regulate the rates of a cable system subject to the following conditions (cable systems that were subject to rate regulation prior to this date will remain subject to that regulation pending demonstration that they may not be regulated pursuant to this section):

(1) Only basic cable service as defined in § 76.5(ii) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever any one of the following conditions are met:

(i) 100 percent of the cable community receives service from at least six unduplicated broadcast television signals and cable penetration in the cable community is less than 50 percent. It is not necessary that the same six signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in § 73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in Section 76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in Section 74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community. Cable penetration must be determined as the number of households that subscribe to cable service divided by the number of homes passed by the cable system, expressed as a

percentage. Homes passed is defined as the number of homes to which cable service is available without a line extension.

Note: For purposes of this section, "unduplicated broadcast television signal" is defined as one which does not duplicate more than 50 percent of another signal's prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n).

(ii) an independently owned, multichannel video delivery service is available to 50 percent of the homes passed by the cable system, and at least 10 percent of those homes actually subscribe to the service. Video delivery services that may be counted include, but are not necessarily limited to, a competing cable system, "wireless cable", satellite master antenna television (SMATV), home satellite dishes (HSD), and direct broadcast satellites (DBS). It is not necessary that the same multichannel video delivery service be available throughout the area. Availability of a competing cable system will be determined by comparing the number of homes passed by such system with the number of homes passed by the incumbent cable system. This competing cable system penetration will be determined as specified in Section 76.33(a)(2)(i). Availability and penetration information for the other multichannel video delivery services may be obtained from publicly available sources, from the operator directly, or from specifically undertaken audits. DBS will be considered to be available to the entire United States when any one such service becomes operational.

Note: For purposes of this section, "independently owned" is defined as _____.

(iii) the cable system meets the Commission's behavioral test for effective competition.

(3) The Commission may grant waivers of the effective competition standard where the filing party submits one or more of the following showings, as appropriate:

(i) the availability of broadcast signal(s) with engineering studies in accordance with § 73.686 of the Commission's rules or by other showings that such Grade B level signals are (or are not) in fact available within the community. In performing the engineering studies noted above, cluster measurements, as provided in § 73.686(b)(2)(viii), may be taken in place of mobile runs as provided in § 73.686(b)(2)(v)). Responsibility for the cost of engineering studies undertaken to refute the predicted availability of Grade B service will fall on the party that loses in the waiver proceeding. Any party intending to obtain this study must first inform the other party and provide it an opportunity to negotiate a resolution. Parties not taking this first step will be assigned full responsibility for the study costs.

(ii) the penetration of a cable system, incumbent or competing, based on a survey of cable households passed and cable subscribers, if the filing party is a franchising authority, or more recent data if the filing party is a cable system;

(iii) the availability or penetration of alternative video delivery technologies with additional information.

(4) A cable system, once determined to be subject to effective competition after the effective date of this section, shall not be subject to regulation for six months after any change in market conditions which would cause it to be determined not to be subject to effective competition. When a cable system not subject to effective competition becomes subject to effective competition due to any change in market conditions, the right of the local franchising authority to regulate the basic cable service rates of such cable system shall terminate immediately. In instances where disputes arise between a cable system and a franchising authority regarding the changed circumstances, the status quo shall be maintained until the matter is resolved either by the parties or the Commission.

(5) Franchising authorities setting regulated basic cable service rates pursuant to this section shall allow a fair return taking into account appropriate costs, including, but not necessarily limited to, direct capital costs, programming, labor, and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, increases in such costs, and the cost of any franchise-imposed requirements not directly related to the provision of cable service, as well as a reasonable profit.

* * * * *

2. Section 76.54 is proposed to be amended by revising paragraph (c) to read as follows:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. Furthermore, if a survey is undertaken pursuant to the provisions of Section 76.33(a)(2)(i) of the rules, notice shall also be served on the franchising authority. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

* * * * *

APPENDIX D

RECOMMENDED CABLE INDUSTRY CUSTOMER SERVICE STANDARDS

February 14, 1990

The cable industry is dedicated to providing our customers a consistently high level of service. We are committed to ensuring that our customers receive a variety of quality programming: reliable, clear signals; and prompt service. To that end, we, as an industry, have voluntarily adopted the following Standards for Customer Service.

Each community and each cable system are different and a reasonable flexibility should be employed in applying these standards; rigidity will hamper rather than help good customer service. We are confident, however, hat the cable industry as a whole will implement these voluntary standards by July 1991, and recommend them for overall operational use by that date.

1. Office and Telephone Availability

A. Knowledgeable, qualified company representatives will be available to respond to customer telephone inquires Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will staff telephones for supplemental hours on weekdays and/or weekends.

B. Under normal operating conditions, telephone answer time by a customer service representative, including wait time, and the time required to transfer the call, shall not exceed 30 seconds.

Those systems which utilize automated answering and distributing equipment will limit the number of routine rings to four or fewer. Systems not utilizing automated equipment shall make every effort to answer incoming calls as promptly as the automated systems.

This standard shall be met no less than ninety percent of the time measured on an annual basis.*

* In certain smaller cable systems with fewer than 10,000 subscribers, systematic measurement of compliance with some of these standards (*e.g.* telephone answering time) will not be cost effective and should not be expected.

C. Under normal operating conditions, the customer will receive a busy signal less than three percent of the total time that the cable office is open for business.

D. Customer service center and bill payment locations will be open for transactions Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours on weekdays and/or weekends during which these centers will be open.

2. Installations, Outages and Service Calls

Under normal operating conditions, each of the following four standards will be met no less than 95% of the time measured on an annual basis.

A. Standard installations will be performed within seven business days after an order has been placed. "Standard" installations are up to 125 feet from the existing distribution system.

B. Excluding those situations beyond the control of the cable operator, the cable operator will respond to service interruptions promptly and in no event later than 24 hours. Other service problems will be responded to within 36 hours during the normal work week.

C. The appointment window alternatives for installations, service calls, and other installation activities will be (a) morning, (b) afternoon, or (c) all day during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours during which appointments can be set.

D. If, at any time an installer or technician is running late, an attempt to contact the customer will be made and the appointment rescheduled as necessary at a time which is convenient for the customer.

3. Communications, Bills and Refunds

A. The cable company will provide written information in each of the following areas at the time of installation and at any future time upon request:

. products and services offered

. prices and service options

. installation and service policies

. how to use the cable service

B. Bills will be clear, concise and understandable.

C. Refund checks will be issued promptly, but no later than the earlier of 45 days or the customers's next billing cycle following the resolution of the request, and the return of the equipment supplied by the cable company if service is terminated.

D. Customers will be notified a minimum of 30 days in advance of any rate or channel change, provided the change is within the control of the cable operator.

FOOTNOTES

[1] *Notice of Proposed Rule Making* in MM Docket No. 90-4, 5 FCC Rcd 259 (1990).

[2] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, § 1 *et seq.*, 98 Stat. 2779 (1984).

[3] 47 U.S.C. § 543.

[4] 47 U.S.C. § 543(b)(2)(A) and (b)(2)(B).

[5] 47 CFR § 76.33(a)(2). *See Report and Order* in MM Docket No. 84-1296, 50 FR 18637 (1985), *Memorandum Opinion and Order* in MM Docket No. 84-1296, 51 FR 21770 (1986). In response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *American Civil Liberties Union v. FCC (ACLU)*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988) that found, in part, that the standard for measuring signal availability was arbitrary and capricious, the Commission modified the manner in which signal availability was measured. *See Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988). Two petitions for reconsider-

ation of this action were filed and one was subsequently withdrawn. The remaining petition, filed by Dubuque, Iowa, on June 15, 1988, concerns changes they propose that the Commission make in the measurement methods used to determine whether a signal is available in the cable community and will be addressed separately.

[6] *See* 47 CFR § 76.33(a)(2).

[7] 47 U.S.C. § 543(b)(3).

[8] In response to the *Notice*, the Commission received 58 initial comments and 36 reply comments. Appendix A lists parties filing comments in this proceeding. The Commission considered related matters in MM Docket No. 89-600 which culminated in the Report to Congress required under Section 623(h) of the Cable Act. Information submitted in that docket has been incorporated, as appropriate, into this proceeding. *See Report* in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990).

[9] The Cable Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522(2). The Commission is bound by the statutory definition which it may not vary and the provision of the Cable Act which, in the absence of effective competition, permits rate regulation of *only* that tier of service which includes local broadcast signals. *See* 47 U.S.C. § 543(b)(1). *See also ACLU supra* at 1565.

[10] As we noted in the *Notice*, the shifting of non-broadcast programming to or from the basic tier does not alter the statutory definition of basic cable service.

[11] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5003.

[12] FCC Staff Study, *Alternative Criteria for Defining Effective Competition : A Statistical Analysis of Small Cable Markets* (1985, updated 1988). This study is included in the record of this proceeding.

[13] MMDS is also referred to as "wireless cable," although not for any statutory or regulatory purpose.

[14] Indeed, no commenter proposed to retain the three signal standard.

[15] For example, cable interests contend that the three signal standard conforms to the congressional directive to establish a readily applicable national standard and that deregulation of rates has fostered the development of cable.

[16] NTIA believes that the best way to serve television viewers in the long run is to expand opportunities for competitive alternatives. A number of other commenters, including BellSouth, the Motion Picture Association of America and the National Private Cable Association, support Commission and congressional actions that would increase competitive alternatives, such as competing cable systems and alternative video delivery technologies, including, for some, local telephone company video distribution. In this regard, the Commission has made several recommendations to Congress which include prohibiting vertically integrated cable programming services from unreasonably refusing to deal with multichannel competitors to cable and removing certain obstacles in the cable franchise process that discourage competing cable systems. *See Report* in MM Docket No. 89-600 *supra*. Also, the Commission has recently acted to ease restrictions on wireless cable operators and thereby facilitate their development as viable competitors to cable. *See Report and Order* in Gen. Docket No. 90-54, 55 FR 46006 (October 31, 1990) and *Further Notice of Proposed Rule Making* in Gen. Docket No. 80-113, 55 FR 46017 (October 31, 1990). The issue of local telephone company video distribution is addressed in CC Docket No. 87-266 (telephone-cable company cross-ownership).

[17] According to Continental Cablevision, statistics provided by the Cable Advertising Bureau indicate that two thirds of the viewing in cable homes is to broadcast stations. We note that the data do not distinguish between local and distant independents and that the actual viewing share for local signals would be somewhat lower than the reported figure.

[18] Moreover, several commenters argue that Congress intended the Commission to determine when a cable system is subject to effective competition for all tiers of service, and to consider the number and nature of competitive alternatives for its entire service package. *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (*House Report)* at 66. Thus, they view a standard based on broadcast signals as inadequate.

[19] As evidence that the three signal standard does not reflect effective competition, NAB cites the joint comments filed by the City of New York, the National League of Cities and the United States Conference of Mayors (NYC/NLC) in MM Docket No. 89-600, which state that in communities with competitive cable systems the price for basic service averaged 19 percent below the national average. *See* Comments of NYC/NLC in MM Docket No. 89-600 at 47.

[20] In particular, a study by Richard V. Ducey and Austin J. McLean of the NAB staff, entitled "The Impact of Off-the-air Signals on Cable Pricing," claims that there is no statistical relationship between the change in basic service price and the number of over-the-air signals. However, we do not believe that the authors adequately explain why a relationship between changes in rates and broadcast signal availability should be expected. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5081. Further, a study by Paul W. MacAvoy for the United States Telephone Association presents an econometric model based on the q ratio, an economic measure of market power, suggests that approximately 60 broadcast signals would be needed to bring cable market values to competitive levels. Because this figure is far outside the signal availability range in his sample and measurement problems, we view the 60 signal finding skeptically. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5082.

[21] While some cable operators have reportedly undertaken retiering of their service offerings in the past year or more, our analysis of the FCC/GAO Survey data shows that the lowest basic service tier increased from an average of 16 channels on December 31, 1984, prior to the adoption of the three signal standard, to 23 channels on December 31, 1989. We note that, on the average system, the difference in signals over this period was accounted for by an increase in the number of cable networks from 7 to 14. *See Broadcasting*, May 21, 1990, at 35.

[22] The FCC, in conjunction with the United States General Accounting Office, recently conducted a survey of cable television rates and services (FCC/GAO Survey). The analysis of the FCC/GAO Survey results indicates that the average number of channels on the most popular service tier increased from 18 channels on December 31, 1984, to 27 on December 31, 1989. That is, the tier of service to which most households on each system subscribe has expanded 50 percent.

[23] All day audience share is defined as the percent of all viewers tuned to the specified signal or signals at any time during the broadcast day. Basic cable programming includes cable networks, such as CNN, ESPN, C-SPAN, MTV and SuperStation TBS. Other satellite distributed television stations are not included in this group. *Cable TV Facts 90*, Cabletelevision Advertising Bureau, Inc., at 8.

[24] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 4995-4997.

[25] The two services do differ, of course, with movie channels offering some first-run and sports programming, plus added convenience, and tape rental offering time flexibility, selection and the ability to pay only for programs one specifically chooses to view.

[26] In fact, distant broadcast signals represent a significant portion of basic cable viewing.

[27] CNN is a 24-hour news service, ESPN is a national sports channel, Nickelodeon is a children's service, BET is a service designed to showcase programming from the perspective of Blacks and C-SPAN carries Congressional proceedings.

[28] Cable systems are able to provide these categories of service because of two key characteristics: (1) multiple channel capacity (which permits the provision of a wide range of programming); and (2) the ability to charge viewers for the specific service or groups of services.

[29] It is well established that as the number of broadcast signals in a market increases, more and more specialized programming is offered. For a discussion of the mechanics of this process, see Wildman and Owen, *Program Competition, Diversity, and Multichannel Bundling in the New Video Industry*, in *Video Media Competition : Regulation, Economics, and Technology* at 250-255 (Noam ed. 1985).

[30] Moreover, there are certain live events, sports in particular, for which there are no exact substitutes.

[31] NCTA submitted a study prepared by James N. Dertouzos and Steven S. Wildman, entitled "Competitive Effects of Broadcast Signals on Cable," that indicates that broadcast signals have a significant competitive effect on cable system behavior, and that five over-the-air signals are now necessary to maximize that effect. NCTA also included this study in its comments in MM Docket No. 89-600. A study by Robert W. Crandall, "Regulation, Competition and Cable Performance," included in the comments of Tele-Communications, Inc. (TCI), supports NCTA's results that cable systems' basic service rates are affected by competition from broadcast signals.

[32] NTIA's conclusion is based on an econometric model of the relationship between the availability of off-air signals and basic cable rates. That model demonstrates that the availability of broadcast signals exerts downward pressure on cable rates. NTIA states that, although the model does not identify a specific number of signals that will assure minimum rates, its study does show that additional signals appear to have a continuing, though diminishing negative effect on basic rates.

[33] NTIA estimates that a six signal standard would subject about 40% of all systems, serving 9% of all subscribers, to regulation based on the sample of 216 systems used for its econometric model. In reply comments, NTIA indicates that a second sample of 238 systems suggests that approximately 52 percent of all cable systems, serving about 18 percent of all subscribers, would be subject to basic service rate regulation under a six signal standard. Based on the sample of 340 systems submitted by NCTA, however, we project that 55% of all systems (34% of subscribers) would be subject to rate regulation under a six signal standard.

[34] For example, Continental estimates that it would cost approximately $6-8 billion to provide service on an unbundled basis on all cable systems.

[35] Commenters cite *House Report* at 66.

[36] This proposal differs from the one submitted by the National League of Cities in 1985. *See Notice* at 263.

[37] While each element of this standard is the same as those proposed by DOJ in 1985, DOJ submitted specific values for determining the existence of effective competition in its earlier proposal. *See Notice* at 263.

[38] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 4995-4997.

[39] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5053-5054.

[40] Proposed rules appear in Appendix C.

[41] For purposes of this alternative, an "unduplicated" signal would be one which does not duplicate more than 50 percent of another signal's prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n). *See* 47 CFR § 76.5(n).

[42] For example, we observe that in markets with large numbers of television signals there are often broadcast stations affiliated with the specialized programming services that are also distributed as cable programming networks (*e.g.*, Univision, Home Shopping Network).

[43] The Dertouzos-Wildman study submitted by NCTA and the NTIA staff econometric analysis estimate that five and six signals, respectively, are sufficient to restrain cable rates.

[44] As we stated in the *Report* in MM Docket No. 89-600, the conclusion of the Dertouzos and Wildman study that the maximum effect of broadcast signals on cable rates is reached at five signals may not be correct because, unlike the NTIA staff study, it did not report the separate effects of greater numbers of channels. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5080.

[45] A recent estimate of the national average penetration of homes passed is just over 60 percent. *See* Paul Kagan Associates, Inc., *Marketing New Media* at 5 (June 18, 1990).

[46] For this purpose, we do not believe that it is necessary to distinguish between mature cable systems (*e.g.*, those in operation for at least five years) and newer systems that are still under construction because the penetration is to be calculated based on homes passed and not homes in the franchise area. However, we seek comment on whether the penetration criterion should make such a distinction and, if so, how a "mature" system should be defined. Further, we request comment on whether our overall revisions of the effective competition standard require additional modifications to encourage the wiring of not yet wired communities.

[47] *See* 47 CFR § 76.33(a)(2).

[48] "Homes passed" is defined as the number of homes to which cable service is available without a line extension.

[49] We also note that it is industry practice to adjust subscriber counts for bulk rate subscribers (*e. g.*, if a basic service tier is $10 and a 200-unit apartment is billed $500, then it would count as 50 subscribers regardless of how may individual apartments receive cable service). We request comment on the appropriate method for determining cable penetration under such circumstances.

[50] We are aware that the development of some of the multichannel video alternatives to cable (*e.g.*, DBS) may be dependent on the participation of cable companies in such ventures. However, we are concerned that cable interests could possibly exert anticompetitive influence over the provision of video service by alternative delivery technologies. Thus, we request comment on the appropriate definition of an "independently owned" entity. In particular, we seek comment on whether the existing Commission rules regarding attribution of

ownership (*e.g.*, the cable attribution rules set forth in Section 76.501) should be applied without change or instead recast for purposes of defining "independently owned" in this context.

[51] We believe that a low penetration rate is sufficient to confirm that such service actually provides a competitive check on the incumbent cable system. We seek comment on whether 10 percent is the correct value or whether some other number (*e.g.*, 5, 15, 20 percent) is a preferable measure.

[52] The comparison would be computed as the number of homes passed by the second competitive cable system within the area served by the incumbent system divided by the number of homes passed by the incumbent cable system and expressed as a percent using the data sources described in para. 24 *supra*.

[53] Once a DBS service is launched, we will presume that it is available to the entire United States. Parties need only provide local penetration figures obtained from the operator.

[54] We invite comment on how this proposal might be modified to account as well for the potential competitive check of multichannel video providers which serve any unwired portions of the incumbent cable system's franchise area (or even outside but adjacent to that franchise area) and are thus well positioned to expand into the service area of an overpriced incumbent.

[55] As we stated in the Cable *Report*, we believe that competition will lead to improved customer service. We also find that local franchising authorities are best positioned to determine when such standards are met in order to account for conditions specific to the local community. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5059-5060.

[56] We intend to allow a reasonable time period (*e.g.*, one year to 18 months) for the marketplace to adapt to our revised structural effective competition standard. Subsequent to that point, we will initiate a rule making proceeding to establish more empirically based behavioral standards reflecting the price and, as appropriate, channel characteristics of those systems meeting either of the two structural conditions supporting a finding of effective competition. We anticipate completion of this proceeding within two years of adoption of our revised effective competition standard.

[57] For any cable system not already in existence on the eve of rate deregulation, we would propose to rely on the figures for the median cable system at that time (as set forth in the subsequent text above).

[58] This price would be adjusted forward to reflect inflation through the date of our Report and Order in this proceeding to the extent possible.

[59] *See Report* in MM Docket 89-600, Appendix F, Table 1A, 5 FCC Rcd at 5085.

[60] This will not place cable systems with smaller channel capacities at a disadvantage because they would have to dedicate only a portion of their channels to basic service.

[61] The Cable Act explicitly provides for a five percent annual increase in basic service rates. *See* 47 U.S.C. § 543(d).

[62] In either case, the rate might subsequently be adjusted for productivity changes and/or factors reflecting local cost differences.

[63] The CPI increased 3.6 percent, 4.1 percent and 4.8 percent for 1987, 1988 and 1989, respectively.

[64] We note that the actual average per-channel basic service rate on December 31, 1989, was $0.61. The 1990 CPI data are not yet available. However, if the permitted five percent annual rate increase under the Cable Act is used as the inflation adjustment, then the 1991 competitive package benchmark price would be $12.42 (18 x $0.69).

[65] Our analysis of the FCC/GAO Survey data determined average rates and services per cable system. The GAO analysis of the survey results examined this information on a per suscriber basis. Using their analysis, the average basic tier included 24 channels at a price of $0.47 per-channel on November 30, 1986. Adjusting these data upward by the annual CPI to the present, the "competitive package" would be a 24 channel basic tier offered at $12.72.

[66] We seek comment on formulas that would identify a price reflecting an upper limit of a zone of reasonableness.

[67] *See* "NCTA Recommended Cable Industry Customer Service Standards," February 14, 1990.

[68] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5060. With respect to enforcement of these standards, we expect that franchising authorities would be able to penalize any systems falsely certifying its compliance. Cable systems could also be required to establish and maintain public files which would enable the public and franchising authorities to ascertain whether the customer service standards have been met. We seek comment on whether this requirement is warranted.

[69] *See* 47 U.S.C. § 543(a).

[70] *See* 47 CFR § 76.33(b). In addition, under the Cable Act, any rate request upon which the franchising authority fails to act within a 180-day period is deemed granted unless the time period is extended by mutual agreement. 47 U.S.C. § 543(d).

[71] The Cable Act also provides that a cable system subject to rate regulation may increase its basic service rates up to 5 percent per year without franchising authority approval. 47 U.S.C. § 543(e)(1). In 1985, the Commission adopted a pass-through provision that allowed cable operators to increase their rates to recoup identifiable costs in addition to the 5 percent annual rate increase permitted under the Cable Act. The court in *ACLU* found that the specific provision adopted by the Commission violated the Cable Act. *See ACLU* at 1570.

[72] DOJ adds that a policy that permits local governments to choose the form of regulation of local cable services they deem most beneficial to their individual situations would not be inconsistent with federal antitrust policy.

[73] *See ACLU* at 1554, 1571.

[74] TCI and others note that the legislative history of the Cable Act specifically rejected rate of return regulation for cable. *See House Report* at 60.

[75] While our own experience demonstrates that incentive-based regulation is superior to traditional rate of return constraints in meeting public policy goals, (*see generally Policy and Rules Concerning Rates for Dominant Carriers* (Second Report and Order), FCC 90-314, released Oct. 4, 1990, *pets. for recon. pending)*, we do not now propose requiring local franchising authorities to use any particular method of implementing this proposed standard.

[76] We did not seek comment in the *Notice*, however, on the standards needed to rebut a *prima facie* showing of the existence or absence of effective competition. We discuss this issue below.

[77] *See* 47 CFR § 76.33(a)(3). *See also Second Report and Order* in MM Docket No. 84-1296 *supra*.

[78] With respect to the competitive package alternative, we believe that it would take a substantial showing to rebut the *prima facie* showing that a cable system is offering at least the specified number of channels at or below the specified price.

[79] Section 76.33(a)(4) of the existing rules permits a one year transition period in such situations. However, we believe that a six month transition period should be sufficient to implement

rate regulation when market conditions change and a cable system no longer faces effective competition. *See* 47 CFR § 76.33(a)(4).

[80] This section of the rules does not apply when a cable system becomes subject to regulation because the Commission modifies the effective competition standard. Subject to OMB approval, any revised rules and standards adopted in this proceeding will become effective ninety days after Commission release of the Report and Order.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket No. 90-4.

As the only Commissioner who was here when the three signal standard was adopted, I welcome today's decision to further review the appropriate test for effective competition for cable television. I reluctantly voted for the three signal test in 1985, when must carry rules were still in effect, and my doubts about its viability have increased during the intervening years.

Based on this experience, I am skeptical that any standard predicated on the availability of over-the-air broadcasting signals adequately represents "effective competition" with cable television. As the *Further Notice* makes clear, a broadcast station is an adequate substitute for only certain aspects of the unique cluster of services that a cable television provides. Moreover, the instant review is premised on changed circumstances in the video marketplace. It is a safe bet that the process of change will continue in the future, and I am not confident that time will be kinder to a six signal standard than it has been to the current test.

I am convinced that the only true competition to cable television is another viable multichannel provider. Until such competition exists, however, I support the concept of establishing alternative conditions as indicators of effective competition and look forward to reading the comments in this proceeding. I am particularly hopeful that some form of "good actor" test or a standard based on multichannel competition can be fashioned that will balance the complex interests at stake.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates

I'm happy to see the Commission's progress, in this item, toward a revised effective competition definition under the Cable Act---and toward an act of government that is sensitive, flexible and responsive to reality rather than merely a blunt instrument.

I seem to have achieved a reputation as a "dove" when it comes to the possible reregulation of cable television---a label that I'm inclined to reject. But to the extent that I have been disinclined to impose draconian, intrusive reregulation upon the cable industry, it is for this reason: I believe that complaints about cable rates and service can be traced, ultimately, to a failure that occurred during the original local franchising process, when de facto monopolies were countenanced. To the extent that Congress ratified those de facto monopolies in the 1984 Cable Act, and the FCC adopted a three signal standard, they may have compounded the original error. It seems to me rather futile, at this late date, to imagine that sudden, drastic, intrusive legislative or regulatory intervention is the right way to correct the problem. Such a regulatory or legislative spasm might prove a cure worse than the disease. For this reason, I have favored encouraging emerging competition as the ultimate, and preferable, remedy.

When I got into the cable debate here at the FCC, I was struck by a paradoxical phenomenon: some cable operators, despite enjoying what appeared to be monopoly status, and despite having the incentive to act like monopolists, behaved rather well. They charged fair prices and offered good service. I was struck by the danger--- and the injustice--- that we would create if our definition of effective competition ensnared the innocent in a net designed for the guilty. And so I became the champion of what has come to be called the "good actor" standard: a standard designed to reward those who, even in the absence of direct competition, behave in ways that suggest the presence of competition. The item we vote upon today puts forward for comment such a behavioral, or good-actor, standard. I endorse the concept. And I'm grateful to all on the FCC staff--- notably Robert Pepper, who heads our Office of Plans and Policy--- for giving it weight and substance.

If such advocacy on my part has made me seem a "dove" on cable, so be it; we live in a city that is given to caricatures and the broad brush. My desire as a regulator, however, is to be not a dove or a hawk, but an owl. The owl is marked by several desirable traits. The owl has large, wide-open eyes. The owl is famous for its wisdom, and for vision acute enough to penetrate even murky darkness. And the owl has another attribute: sharp talons.

Lest anyone mistake my reasonable restraint for naivete, I want to make something clear as we proceed toward a new definition of effective competition under the Cable Act: I will be watching, with owl-like intensity, to see whether operators in the cable television industry are truly good actors, offering superior service at reasonable rates. To the extent that they presume upon my restraint and good will--- and to the extent that complaints about exorbitant rates and shoddy service persists and increase---this owl will not hesitate to employ his regulatory talons.

Before the
Federal Communications Commission
Washington, D.C. 20554

Application of

WKLX, INC. No. BLH-880506KB

For License to Cover Construction
Permit for WKLX(FM), Rochester
New York

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1991; Released: January 14, 1991

By the Commission:

1. The Commission has under consideration: (1) a "Petition for Reconsideration of Grant of License to WKLX(FM)" ("Petition"), filed on December 16, 1988, by Stoner Broadcasting System, Inc. ("Stoner"), licensee of WCMF(FM), Rochester, New York, against the November 7, 1988 grant of the license application for WKLX(FM), Rochester, New York, filed by WKLX, Inc. ("WKLX"), licensee of WKLX(FM); and (2) responsive pleadings.[1]

2. Stoner claims that objectionable interference is being caused to WCMF(FM) by the operation of WKLX(FM) in implementing program test authority ("PTA") under BMPH-880314IG (granted April 11, 1988). Specifically, Stoner claims that WCMF(FM) has been receiving interference as a result of Receiver Induced Third Order Intermodulation Effect ("RITOIE") since WKLX(FM)'s move to a new transmitter site pursuant to BMPH-880314IG.[2] On this basis, Stoner filed, on September 9, 1988, an "Informal Objection" to WKLX's September 1, 1988 letter in which WKLX requested that it be granted standard PTA and that its pending Form 302 license application be granted. [3] Stoner objected to the grant on the grounds that: (1) contrary to the claims of WKLX(FM), WCMF(FM) continues to suffer interference as a result of WKLX(FM)'s recent site move; (2) nothing has been done about complaints involving mobile receivers; and (3) many of the "fixes" are likely to be undone by listeners if they want to receive stations other than WCMF(FM). In response, by letter dated September 29, 1989, WKLX stated that it had clearly documented that WKLX has resolved " *every* verified complaint . . . it received about reception on non-mobile radios of WCMF's signal." In a letter dated November 7, 1988, the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), found that while WKLX(FM)'s move to its new site had initially resulted in RITOIE-based service disruptions, its efforts to resolve the problem were sufficient to fully discharge its responsibility in this matter. In so ruling, the Bureau upheld WKLX's exclusion of mobile and battery-powered receivers from the scope of its RITOIE resolution efforts. Accordingly, the Bureau granted WKLX's license application and denied Stoner's September 9, 1988 Informal Objection, finding that Stoner had failed to state a claim on which relief can be granted.

3. Stoner requests reconsideration of the grant of the license on the grounds that: (1) WKLX made a material misrepresentation in its application by claiming that no receiver-induced intermodulation interference would result from the proposed move; (2) the grant of WKLX(FM)'s license constitutes a modification of WCMF(FM)'s license without notice and opportunity to be heard in violation of Section 316 of the Communications Act; (3) the Bureau erred in finding that WKLX's interference resolution efforts were sufficient to fully discharge its responsibility in this matter; and (4) the Bureau's decision to exclude mobile and battery-powered receivers from the scope of RITOIE resolution violates Commission precedent and lacks the reasoned decision making required by the Administrative Procedure Act. Stoner further requests that the Commission: (1) designate the WKLX(FM) license for hearing on the misrepresentation issue and to determine whether the modification of the WCMF(FM) license would be in the public interest; and (2) in the meantime, suspend program test authority for WKLX(FM) and compel it to return to its former transmitter site or, at a minimum, bear the cost of remedying all aspects of the interference.

4. In its opposition, WKLX argues that Stoner's Petition should be dismissed or denied as procedurally defective under Section 1.106 of the Rules, or as moot because Stoner filed an application (BPH-881209ID) to relocate its transmitter to the WKLX(FM) site to eliminate the RITOIE. Alternatively, WKLX contends that Stoner's Petition should be denied for lack of substantive merit on the grounds that: (1) WKLX's applications and amendments contain no misrepresentations or lack of candor; (2) WKLX(FM)'s grant does not modify Stoner's license in violation of Section 316 of the Communications Act; (3) WKLX's complaint resolution program fully discharges its interference resolution responsibility; and (4) WKLX is not required to resolve mobile or battery-powered receiver complaints. WKLX also requests that, pursuant to Section 1.106(a)(1) of the Commission's Rules, Stoner's Petition be referred to the Commission and treated as an application for review of the Bureau's letter instead of as a petition for reconsideration.

5. In its reply, Stoner: (1) contends that its Petition is procedurally proper, and is not moot because it has requested the withdrawal of its relocation application;[4] and (2) reiterates the four arguments it advanced in its Petition.

6. *Procedural Issue.* WKLX has requested that Stoner's Petition be treated as an application for review and referred to the Commission. Treating the Petition in this manner should assist in expeditiously resolving the matters at issue in this proceeding and the Petition will accordingly be treated as an application for review. As such, and notwithstanding the procedural concerns raised by WKLX referenced in paragraph 4 above, we find it to be procedurally acceptable under Section 1.115 of the Rules.

7. *License Modification.* Stoner argues that WCMF(FM)'s license was modified without notice and opportunity to be heard in violation of Section 316 of the Communications Act, which provides that a license "modification" shall not become final until the licensee is notified in writing and given a reasonable opportunity to protest. 47 U.S.C. § 316(a)(1). Specifically, Stoner contends that the grant of the WKLX(FM) license constitutes an "indirect modification" of WCMF(FM)'s license which

presents a "substantial and material question of fact" requiring a hearing under Section 316, 47 U.S.C. §§ 316(a)(3) and 309(d)(2). Stoner claims this indirect license modification is caused by the RITOIE that results from the interaction of the operating frequencies of newly collocated WKLX(FM) and WRMM(FM), which generates within many receivers a signal on the same frequency as WCMF(FM) and results in WCMF(FM)'s signal not being receivable on many receivers within its protected service contour.

8. In response, WKLX argues that RITOIE is not the type of interference cognizable as a matter of law or fact under Section 316 as an indirect license modification, because implicit in the Section 316 license modification concept is: (1) a permanent loss of radio service which listeners are accustomed to receiving; and (2) which is directly caused by another licensed broadcast facility, citing in support *Pike - Mo Broadcasting Co.*, 2 FCC 2d 207, 208-09 (1965). WKLX claims that Stoner has not met this evidentiary standard because RITOIE is both *receiver*-generated and *receiver*-specific and thus, as a technical engineering matter, is neither: (1) a persistent or consistent interference problem; nor (2) "WKLX-caused." Additionally, WKLX argues that there does not now exist a consistent or persistent interference problem amounting to a permanent loss of radio service because all verifiable non-mobile service disruption complaints have been resolved.

9. Stoner counters that the two-part test laid out by WKLX is met in this case because: (1) listeners previously accustomed to receiving WCMF(FM) have now permanently lost that service; and (2) notwithstanding the fact that receiver-induced interference is generated in the receiver and is receiver-specific, it is still caused by WKLX(FM) because "but for WKLX's operation at its new transmitter site, the receiver induced interference would not exist."

10. We have examined the arguments and find that Stoner is not entitled to a hearing under Section 316. Disruption of service created as the result of the transmission of undesired signals, where not dependent upon receiver characteristics, may create a Section 316 right if uncorrected. *See, e.g., Western Broadcasting Co. v. FCC*, 674 F.2d 44 (D.C. Cir. 1982); *FCC v. National Broadcasting Company (KOA)*, 319 U.S. 239 (1943); and *Pike - Mo, supra*. In the case of RITOIE, the transmitted signals fully comply with all of our emission standards and requirements but nonetheless, because of the particular characteristics of certain receivers, result in service disruption within those receivers, and not others. We do not believe that service disruption to particular receivers because of their particular characteristics establishes a *prima facie* case of license modification.[5] However, where such reception problems occur after a station begins operation, the Commission may find it in the public interest to require resolution of individual complaints. In the present case, the applicant has taken appropriate measures. As the Bureau stated in its November 7, 1988 letter: (1) WKLX's technical and educational efforts are sufficient to "fully discharge" its responsibility in this matter; and (2) Stoner "submitted no supporting documentation" with its September 9, 1988 Informal Objection demonstrating the existence of any new unresolved non-mobile service disruption complaints.

11. *Service Disruption: Non - Mobile Receivers*. Stoner claims that under the Commission's longstanding "newcomer" policy, WKLX is required to eliminate objectionable interference to existing licensees such as WCMF(FM), citing in support *Midnight Sun Broadcasting Co. v. FCC*, 11 FCC 1119 (1947) and *Sudbrink Broadcasting of Georgia, Inc. v. FCC*, 65 FCC 2d 691 (1977). Stoner argues that the Bureau erred in ruling that WKLX's efforts were "sufficient to fully discharge" its responsibilities in this matter because "WKLX should be responsible for a solution that eliminates the interference, not just addresses some reported cases of it." Stoner contends that in order to eliminate the RITOIE disruption the Commission should: (1) deny WKLX(FM)'s license application and require it to return to its old site; or (2) permit WCMF(FM) to relocate its facilities to the same tower from which WKLX(FM) transmits[6]; and (3) require WKLX to be fully responsible, financially and otherwise, for effectuating either of these two solutions.

12. WKLX counters that while *Midnight Sun* and *Sudbrink* require elimination of objectionable interference, they do not: (1) require WKLX to resolve the interference beyond addressing the reported cases; or (2) impose any moral or financial responsibility to undertake and pay for a solution that permanently eliminates the interference. WKLX asserts that *Midnight Sun* "holds only that the 'newcomer' station would be obligated 'to satisfy any *complaints* of interaction [interference],'" 11 FCC at 1120 (emphasis added); and that *Sudbrink*, while recognizing a station's financial responsibility to resolve interaction between transmitting facilities, also emphasizes that it is appropriate for the paying licensee "to assure that excessive and needless costs are not being incurred," 65 FCC 2d at 693. WKLX claims that since it satisfied the interference complaints in compliance with *Midnight Sun*, thereby eliminating any cognizable interference problem, Stoner's desire to effect a permanent solution by relocating its transmitter is the "very kind of 'excessive and needless costs' that *Sudbrink* holds are voluntary." Thus, WKLX argues that the Bureau was correct in deciding that WKLX had "fully discharge[d]" its interference resolution responsibilities by addressing individual complaints and that WKLX thus would not be held financially responsible for any further actions WCMF(FM) might wish to take.

13. In reply, Stoner contends that WKLX's efforts have not discharged its responsibilities, and states that while *Sudbrink* permits the reimbursing station's engineers "to participate to the extent necessary to assure that excessive and needless costs are not being incurred" in the elimination of the interference, 65 FCC 2d at 693, this "has never been held to require only a second-rate solution."

14. The Commission has consistently found it to be in the public interest to require a "newcomer" to make reasonable efforts to alleviate RITOIE-based service disruptions to reception of an existing FM licensee where actual listener complaints have been received. Further, it has also been established policy to permit RITOIE resolution on a "complaint-by-complaint" basis and, consistent with *Sudbrink*, at minimum cost to the paying licensee. *See, e.g., Letter to Bible Broadcasting Network, Inc. and WCMS Radio Norfolk, Inc.*, reference 8920-DEB/GRM (Chief, FM Branch, April 11, 1986). In accordance with these policies, WKLX was ordered to resolve the RITOIE complaints. Subsequently, WKLX submitted documented reports detailing the corrective action taken and, in a

letter dated September 29, 1988, stated that it had resolved "every verified complaint" it had received about reception of WCMF(FM)'s signal on non-mobile radios. By letter dated November 7, 1988, the Bureau: (1) accepted this showing; (2) found that WKLX's efforts were sufficient to fully discharge its responsibility in this matter; and (3) held that WKLX would thus not be held financially responsible for any further action WCMF(FM) might wish to take. Upon review of Stoner's Petition, we find no reason to modify this decision. Accordingly, we affirm that WKLX has satisfactorily cured the service disruption to WCMF(FM)'s signal with respect to non-mobile receivers.

15. *Service Disruption: Mobile and Battery - Powered Receivers*. Stoner contends that the Bureau erred in excluding mobile and battery-powered receivers from the scope of the complaints WKLX was required to address under its RITOIE resolution program. Stoner alleges that the Bureau's exclusion of mobile receivers, by relying on a Commission ruling excluding mobile receivers from consideration when dealing with FM blanketing interference, is erroneous because RITOIE and blanketing are significantly different and thus should not be treated similarly, a fact Stoner claims the Commission itself acknowledged when it declined to address RITOIE in the blanketing interference Rule Making. *See FM Broadcast Station Blanketing Interference* (" *FM Blanketing* "), 57 RR 2d 126, 130 (1984). Stoner claims this incorrect application of the policy in *FM Blanketing* violates the duty imposed by the Administrative Procedure Act (APA) to proceed with reasoned decisions supported by substantial evidence and to explain fully all departures from earlier rules. Stoner also contends that the Bureau erred in accepting, without stating any reasoned basis therefor, WKLX's assertion that battery-powered receivers fall within the definition of mobile receivers. Stoner claims that mobile receivers are those "contained in a vehicle" and that the inclusion of battery-powered receivers in this category is without precedent.

16. WKLX contends that the Bureau's explanation of its decision to exclude mobile and battery-powered receivers from the scope of WKLX's interference resolution responsibility fully meets the requirements of the APA and Commission precedent. In support, WKLX argues that: (1) neither exclusion constitutes a new policy decision; (2) the Bureau's reliance on *FM Blanketing* to exclude mobile receivers from RITOIE consideration is justified; (3) it has been the Bureau's past practice to exclude mobile receivers in RITOIE cases; and (4) battery-powered receivers are as mobile and transient as car radios and thus warrant similar treatment. Nonetheless, WKLX notes that it has voluntarily undertaken to rectify interference problems of home portable radios where their locations are reasonably constant.

17. We have reviewed the matter and find that the decision to exclude mobile and battery-powered receivers from the scope of RITOIE resolution is not a departure from precedent and is not in violation of the APA. It has been past Commission policy to exclude mobile receivers from consideration with respect to blanketing interference. *See* FM *Blanketing* at 130, para. 25. The Bureau's reliance on the principles set forth in *FM Blanketing* in support of its decision in this case regarding RITOIE is justified. The Commission decided not to include RITOIE under the scope of the blanketing Rule Making because it was not within the definition of blanketing interference in the *Notice of Proposed Rule Making* in that proceeding.[8] *See FM Blanketing* at 130, para. 29. The Commission defined blanketing as interference that occurs when "an FM station's signal strength or signal power density is of such magnitude that it causes receivers near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations." *Notice* at para. 2; *FM Blanketing* at 126, para. 2. In contrast, RITOIE occurs when the signals of two stations interact within a receiver to generate a third signal which disrupts the reception of any station operating on the same frequency as the receiver-generated signal. In other words, RITOIE "is similar in its effects to blanketing but different in origin." *FM Blanketing* at 127, para. 7. Given this difference in origin, the Commission's decision not to include RITOIE under the scope of the blanketing Rule Making was an acknowledgment only that notice had not been given with regard to RITOIE. It did not, however, preclude similar treatment of RITOIE where similar treatment is warranted.[9] The Commission has the discretion to proceed by adjudication rather than Rule Making here, *see SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and nothing in the APA or elsewhere precludes us from using the principles set forth in a Rule Making decision to decide an adjudication on a similar issue not precisely covered by the Rule Making. With respect to mobile receivers, the basis for their exclusion from blanketing considerations is their "inherent transient nature." *FM Blanketing* at 130, para 25. This factor is equally salient with respect to RITOIE because, as is the case with FM blanketing, a mobile receiver moving through the potential interference area will encounter constantly varying propagation paths and signal strengths from the pertinent stations, resulting in a continuously varying potential for interference (ranging from a high likelihood to none at all) depending on the particular receiver's susceptibility to RITOIE. Accordingly, similar treatment of mobile receivers with respect to both blanketing and RITOIE is warranted. Further, battery-powered receivers are also characterized by an "inherent transient nature." Accordingly, excluding them from the scope of both blanketing and RITOIE resolution efforts is equally justified. Thus, we uphold the Bureau's exclusion of both mobile and battery-powered receivers from RITOIE resolution requirements.

18. *Misrepresentation*. Stoner also argues that WKLX, in its July 1987 amendment to its pending modification application (BMPH-860714IB), "misrepresented to the Commission by its answer to [Item 14, Section V-B, FCC Form 301 (October 1986)[10]], that there were not any authorized FM transmitters within 10 kilometers of the proposed antenna which may produce receiver induced intermodulation interference." Stoner charges that: (1) this misrepresentation was "reckless, if not intentional"; (2) WKLX "must have known of the possibility" of RITOIE, yet nevertheless "gave a misleadingly incomplete answer [to Item 14], with no mention of receiver induced interference"; (3) WKLX "knew, or ought to have known" that collocation was "likely to cause interference"; (4) the "possibility of RITOIE interference would be apparent to any responsible engineer" and is mathematically calculable; (5) WKLX "did not disclose" the problem prior to construction; (6) WKLX "concealed" the interference problem; and (7) the "principals of WKLX have publicly admitted that they 'anticipated' interference problems."

19. WKLX claims that Stoner's charges are procedurally defective because they are not supported by any declaration or affidavit by someone with personal knowledge of the facts in violation of the general pleading requirements of Section 309(d) of the Communications Act and Section 1.229(d) of the Commission's Rules for designation of hearing issues. WKLX also charges that Stoner's allegations are "plainly incorrect as a matter of fact and law" because: (1) WKLX's July 1987 application amendment, which first proposed collocation with WRMM(FM), answered "Yes" to Item 14's inquiry regarding the existence of "transmitters which may produce receiver-induced intermodulation interference"; (2) Exhibit E-1 of the amendment referenced (without call signs) ten FM and five TV stations that were located within 10 kilometers of the proposed site; (3) "neither WKLX nor its consulting engineers had any *actual* knowledge that there would be any interference at any time throughout the filing and application processing period leading to grant of the construction permit"; and (4) WKLX "had no reason to specifically anticipate a RITOIE problem" in this case because "as of July 7, 1987, there had only been three RITOIE cases known to have been reported to the Commission out of the hundreds of collocated facilities in the United States." WKLX argues that, "[i]n light of these indisputable facts[,] . . . it provided as much interference 'notice' in its filings as the engineering state-of-the-art and the requirements of Commission Krules and policies dictated and warranted."

20. In response, Stoner contends that: (1) its misrepresentation claim is procedurally proper because the evidence on which it is based is all a matter of public record for which no affidavit is required; and (2) notwithstanding the answer of "Yes" to Item 14, WKLX did not comply with Item 14's instructions to provide "a description of any expected, undesired effects of operations and remedial steps to be pursued if necessary, and a statement accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver induced or other types of modulation)." Stoner argues that WKLX: (1) "made not a single mention of receiver-induced or 'RITOIE' interference" in its amendment application; (2) did not describe any remedial steps to be pursued; and (3) promised only to rectify all complaints of interference pursuant to Section 73.318 which deals solely with blanketing interference.

21. With respect to the procedural aspect of this issue, we will consider Stoner's allegations only to the extent that they are based on facts of which official notice may be taken. As for the arguments on the merits, we disagree with Stoner's claim that WKLX's answer to Item 14 indicates that "there were not any authorized FM transmitters within 10 kilometers of the proposed antenna which may produce receiver induced intermodulation interference." WKLX complied with the Commission's reporting requirements through its affirmative answer to Item 14, which put others on notice of the possibility of interference, including service disruption caused by receiver-induced intermodulation. As to WKLX's failure to provide a description of any expected interference and remedial steps it would take, Stoner has provided no factual basis to suggest that at the time WKLX filed its application it "expected" any such interference and therefore in some way intended to deceive the Commission by its silence, which traditionally has been the *sine qua non* of a misrepresentation issue. *CBS, Inc.*, 49 FCC 2d 1214, 1223 (1974), *cited in Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (1980). Accordingly, we find that Stoner has not made a *prima facie* showing under Section 309(d) that WKLX engaged in misrepresentation. In any event, in light of WKLX's sworn statements that it in fact had no knowledge of any expected interference, and given that RITOIE is a rare occurrence, we believe no substantial and material questions of fact exist regarding possible misrepresentation.

22. In conclusion, the Bureau's letter articulated positions which we believe are sound. Thus, having given full and detailed consideration to the Petition, we find that Stoner has failed to state a claim on which relief can be granted. Accordingly, Stoner's Petition for Reconsideration IS DENIED. Additionally, the license grant of WKLX(FM) to WKLX, Inc., File No. BLH-880506KB, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] These include the January 10, 1989 "Opposition to Petition for Reconsideration" filed by WKLX and the January 24, 1989 "Reply of Stoner Broadcasting System, Inc." filed by Stoner.

[2] RITOIE occurs when strong signals from two stations interact within a receiver to generate a signal on a third frequency. This receiver-generated signal will disrupt reception of any station operating on this third frequency. RITOIE arises in the instant case because the carriers of WKLX(FM) (98.9 MHz) and WRMM(FM) (101.3 MHz), which operate from the same transmitter site, enter into a two-frequency third order intermodulation product (98.9 x 2 - 101.3 = 96.5 MHz) that is co-channel with WCMF(FM).

[3] Prior to the filing of its Informal Objection, Stoner complained to the Commission on April 29, 1988. The Field Operations Bureau verified the service disruption on April 29 and May 3, 1988. Accordingly, the Commission suspended PTA on May 3, 1988 and granted limited PTA on May 6, 1988 to enable WKLX to resolve the complaints. On May 18, June 2 (supplemented June 3), and August 31, 1988, WKLX submitted reports detailing the corrective action taken. We note that the Commission has not received any additional complaints of interference since that time. By letter dated September 1, 1988, WKLX stated that its August 31 report clearly demonstrated that all documented complaints to WCMF(FM) stemming from the WKLX(FM) tower move have been resolved and that no further problem exists, and requested that WKLX(FM) be immediately granted standard PTA and that its pending Form 302 license application (filed May 6, 1988) be promptly granted.

[4] The application was subsequently dismissed on February 10, 1989.

[5] Even if such service disruption did constitute a *prima facie* case of license modification, because Stoner's objection includes no documentation of any unresolved non-mobile disruption complaints, no substantial and material questions of fact would remain with regard to non-mobile service disruption. Each of the 164 verified non-mobile complaints received as of June 1,

1988 (the date of WKLX' "Final Report" to the Commission on resolution of the complaints) has been resolved to the satisfaction of the Commission.

[6] On December 9, 1988, Stoner filed an application for construction permit (BPH-881209ID) to relocate WCMF(FM)'s transmitter to WKLX(FM)'s present site. On January 24, 1989, Stoner requested that its application be dismissed. *See* "Reply of Stoner Broadcasting System, Inc.," Attachment A, January 24, 1989. The application was dismissed on February 10, 1989.

[7] Stoner claims that WKLX "did not treat 15 percent of the complaints simply because it was unable to contact the listener or because it arbitrarily determined that the listener lived too far away." Additionally, Stoner noted that mobile and battery-powered receivers, which constitute 57 percent of the complaints, were not treated at all.

[8] *Notice of Proposed Rule Making* (*Notice*) in BC Docket No. 82-186, 47 Fed. Reg. 18,936 (1982).

[9] *Cf. New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987) (similar circumstances require similar treatment; the Commission has the expertise to determine when circumstances are similar).

[10] Item 14 asks: "Are there . . . within ten (10) kilometers of the proposed antenna, any proposed or authorized FM or TV transmitters which may produce receiver-induced intermodulation interference?"

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC TELECOM TRANSMISSION SERVICES, INC.	File Nos. CSG-90-101-P/L CGS-90-101-P/L(A)
Application for authority to construct and operate international earth station facilities at Moores Valley, Oregon for provision of INTELSAT multipurpose services in the Pacific Ocean Region	
Application for authority to establish channels of communication between the Moores Valley, Oregon earth station and INTELSAT Pacific Ocean Region satellites for provision of restoration services.	File No. I-T-C-91-008

ORDER AND AUTHORIZATION

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by Pacific Telecom Transmission Services, Inc. (PTTS), request authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international multipurpose earth station facilities at Moores Valley, Oregon, and to use these facilities to establish channels of communications between the earth station and INTELSAT Pacific Ocean Region (POR) satellites to provide restoration capacity for the North Pacific Cable System (NPC). The applications were placed on public notice on August 22, October 18 and November 15, 1990. No comments were received.

2. The proposed earth station will consist of an 18.3-meter antenna which shall meet INTELSAT Revised Standard A technical parameters and will communicate with INTELSAT POR satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The facilities will be located at PTTS's fiber optic cable repeater station at Moores Valley, Oregon, and will be used to provide emergency restoration for the NPC system presently being installed by PTTS.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station ownership policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system.[1] The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[2] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present. [3] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. Upon consideration of the applications, we conclude that authorization of the requested services and facilities will serve the public interest. PTTS's legal, technical and financial qualifications to construct and operate the proposed international earth station are well-established. The proposed earth station shall comply with INTELSAT performance criteria for Revised Standard A stations. PTTS has also completed the necessary frequency coordination. Further, we find that the proposed multipurpose earth station will not adversely affect INTELSAT, since it will be used specifically to restore service in case of outage of the NPC system and not for general multipurpose service in the Pacific Ocean Region.

6. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of multipurpose satellite services by PTTS for restoration purposes.

7. Accordingly, IT IS ORDERED that applications File Nos. CSG-90-101-P/L, CGS-90-101-P/L(A) and I-T-C-91-008 ARE GRANTED, and PTTS is authorized to:

a. construct and operate the proposed 18.3-meter earth station facilities at Moores Valley, Oregon;

b. establish channels of communications between the subject earth station and INTELSAT POR satellites; and

c. utilize these facilities to provide restoration capacity for the NPC system to points in the Pacific Ocean Region.[4]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Earth Station Ownership*, 100 FCC 2d 250 (1984).

[2] The joint carrier owners decided to dissolve ESOC.

[3] *Earth Station Ownership*, 100 FCC 2d at 284.

[4] This authorization is not to be construed as permitting the provision of any service between earth stations located within the U.S.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOMMUNICATIONS SERVICES, INC. — File No. I-T-C-91-004

Application for authority to operate as an international resale carrier.

FEEK'S TELECOMMUNICATIONS, INC. — File No. I-T-C-91-005

Application for authority to operate as an international resale carrier.

LONG DISTANCE NETWORK, INC. — File No. I-T-C-91-014

Application for authority to operate as an international resale carrier.

AMERICAN LONG DISTANCE OPERATOR SERVICES, INC. — File No. I-T-C-91-018

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by Telecommunications Services, Inc. (TSI), Feek's Telecommunications, Inc. (Feek's), Long Distance Network, Inc. (LDN) and American Long Distance Operator Services, Inc. (ALDOS), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the swtiched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on October 18 and 24, 1990. No comments were received.

2. TSI and Feek's are start-up companies. LDN and ALDOS are domestic resale carriers. All four applicants propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TSI, Feek's, LDN and ALDOS.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-004, I-T-C-91-005, I-T-C-91-014 and I-T-C-91-018 ARE GRANTED; and

a. TSI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2 between the U.S. and the pointes listed in those tariffs;

b. Feek's is authorized to provide international switched voice services by the resale of the international switched voice services set forth in U.S. Sprint's Tariff FCC No. 1 between the U.S. and the overseas points listed in that tariff;

c. LDN is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and US Sprint's Tariff FCC No. 1 between the U.S. and the overseas points listed in those tariffs; and

d. ALDOS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the overseas points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. CSG-90-051-P/L, File No. CSG-90-052-P/L

Applications for authority to construct and operate two identical 18.3-meter C-band INTELSAT Revised Standard A multipurpose earth stations at Salt Creek, California.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 27, 1990 by the American Telephone & Telegraph Company (AT&T), request authority pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate two identical 18.3-meter C-band international multipurpose INTELSAT Revised Standard A earth stations at Salt Creek, California for the provision of international telecommunication services. The applications were placed on public notice on May 2, 1990. No comments were received.

2. The proposed earth stations will consist of two identical 18.3-meter antennas which shall meet INTELSAT Revised Standard A technical parameters and communicate with INTELSAT satellites in the Pacific Ocean Region (POR). The proposed earth stations will operate in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allows entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. AT&T's legal, technical and financial qualifications to construct and operate the proposed earth stations are established. AT&T provides many different types of domestic and international services, including the operation of several multipurpose earth stations. The proposed earth stations shall conform with INTELSAT performance criteria for Revised Standard A earth stations. AT&T has completed the necessary frequency coordination.

6. Upon consideration of the applications, we find that authorization of the requested facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that applications File Nos. CSG-90-051-P/L and CSG-90-052-P/L ARE GRANTED, and AT&T is authorized to construct and operate the proposed INTELSAT Revised Standard A earth stations at Salt Creek, California for the provision of international communication services. [3]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that no service shall be provided via the subject Salt Creek, California earth stations prior to grant of authority for such service pursuant to Section 214 of the Communications Act.

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applica-

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Earth Station Ownership*, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE &
WIRELESS
COMMUNICATIONS,
INC.

Application for authority to lease and operate terrestrial facilities for the provision of private line service between the United States and Canada. File No. I-T-C-90-102

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed on April 13, 1990, by Cable & Wireless Communications, Inc. (C&W) and supplemented by letters of April 19, July 30, and December 24, 1990, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate terrestrial facilities for the provision of private line service between the United States and Canada. The application was placed on public notice on May 16, 1990. No comments were received.

2. C&W is a wholly-owned subsidiary of Cable & Wireless, PLC, a public limited company organized under the laws of the United Kingdom which provides telecommunications services. As a result, C&W is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies[1] and is dominant in its provision of all international common carrier services between the United States and all other countries, including Canada. Thus, C&W remains subject to traditional entry and rate regulation. C&W is currently authorized to provide switched voice services by resale between the United States and 161 countries. C&W also is currently authorized to provide switched voice services to Canada through participation in the International Communications Group.[2] In addition, C&W has authority to provide direct switched services, including voice, data, telex and facsimile service, between the United States and Canada over its own facilities. [3] C&W now seeks authority to provide private line service between the United States and Canada over its own facilities. The application is a result of successful negotiations with Canadian Pacific Telecommunications, Inc. (CNCP). By its December 24, 1990 letter, C&W requests that the Commission act on the instant application only to the extent of granting authority for private line service solely between the United States and Canada and without interconnection with the public switched telephone network.

3. Our review of the record demonstrates that grant of the application will serve the public interest by increasing competition in the provision of facilities-based services to Canada. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[4] However, we shall limit the grant of authority for use of the facilities authorized herein to the provision of United States-Canada private line services only -- that is, private lines that originate in the United States and terminate in Canada or private lines that originate in Canada and terminate in the United States. We shall also prohibit the interconnection of the private lines provided pursuant to this authorization with the public switched telephone network. We will defer for future determination the questions of use of the facilities authorized herein for the provision of private line services beyond the United States and Canada and interconnection of such private lines with the public switched telephone network.

4. Upon consideration of the subject application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the acquisition of the requested facilities for C&W's provision of private line service between the United States and Canada.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-102 IS GRANTED IN PART, and C&W is authorized to:

a. lease and operate the following facilities between the United States and Canada:

State/Province	Crossing Point	No. of Circuits
Washington-British Columbia	Blaine	4-T-1 Circuits
Michigan-Ontario	Detroit	7-T-1 Circuits
New York-Ontario	Buffalo-Peace Bridge	3-T-1 Circuits
New York-Quebec	Mooers Forks	2-T-1 Circuits

b. use the facilities in a. above to provide private line service between the United States and Canada.

6. IT IS FURTHER ORDERED that the authority to use the facilities authorized herein is limited to the provision of United States-Canada private line service only -- that is, private lines which originate in the United States and terminate in Canada or which originate in Canada and terminate in the United States and such private lines shall not be interconnected with the public switched telephone network.

7. IT IS FURTHER ORDERED that the questions of use of the facilities authorized herein for the provision of private line services beyond the United States and Canada and interconnection of such private lines with the public switched telephone network ARE DEFERRED until further order.

8. IT IS FURTHER ORDERED that grant of application File No. I-T-C-90-102 is subject to the condition that C&W will be classified as dominant in the provision of private line service between the United States and Canada absent an express determination by the Commission that C&W is non-dominant.

9. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter.

10. IT IS FURTHER ORDERED that C&W shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreement for Canada entered into by it within 30 days of its execution as required by Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

11. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that C&W shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

13. IT IS FURTHER ORDERED that C&W shall file additional Section 214 applications to supplement existing facilities to Canada or to make additional use of the facilities authorized herein.

14. IT IS FURTHER ORDERED that this authorization is subject to possible revocation or modification as a result of findings, rules, requirements or other actions resulting from the Commission's resolution of *Regulation of International Accounting Rates*, 5 FCC Rcd 4948 (1990), or other proceedings.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective on adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.106, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. §1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* International Carrier Policies, 102 FCC 2d 812 (1985) *recon. denied* 60 R.R. 2d 1435 (1986).

[2] *See* Southernnet of South Carolina, Inc., 5 FCC Rcd 1024 (Com. Car. Bur. 1990), *amended*, 5 FCC Rcd 2094 (Com. Car. Bur. 1990).

[3] *See* Cable & Wireless Communications, Inc., Order, Authorization and Certificate, File No. I-T-C-90-101, DA 90-1822, released December 18,1990.

[4] *See e.g.*, cases cited in Teltec Savings Communications Co., File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN
TELECOMMUNICATIONS
CORP.

Application for authority to establish channels of communications between the Susupe, Saipan earth station and INTELSAT Pacific Ocean Region satellites for the provision of INTELSAT Business Services between the Northern Mariana Islands and Pacific points — File No. I-T-C-90-083

MICRONESIAN
TELECOMMUNICATIONS
CORP.

Application for authority to modify its Susupe, Saipan 13-meter C-band earth station, Call Sign KA-34, for the provision of INTELSAT Business Services — File No. CSG-90-046-ML

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 2, 1990 by Micronesian Telecommunications Corporation (MTC), request authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and Sections 201 (c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to establish channels of communications between its Susupe, Saipan earth station (Call Sign KA-34) and INTELSAT Pacific Ocean Region satellites and to modify its 13-meter C-band INTELSAT Standard B earth station, Call Sign KA-34, at Susupe, Saipan, Northern Mariana Islands for the provision of INTELSAT Business Services (IBS) between the Northern Mariana Islands and various Pacific points. The applications were placed on public notice on April 11 and 25, 1990, respectively. No comments were received. Upon consideration of the applications, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-083 and CSG-90-046-ML ARE GRANTED, and MTC is authorized to:

a. establish channels of communication between its Susupe, Saipan earth station, Call Sign KA-34, and INTELSAT Pacific Ocean Region satellites for the provision of IBS and related digital video services between the Northern Mariana Islands and those Pacific points which are now or may hereafter be listed in Comsat's tariff provisions for the space segment component of IBS and related digital video services; and

b. modify its 13-meter C-band INTELSAT Standard B earth station, Call Sign KA-34, at Susupe, Saipan for the provision of IBS and related digital video services, provided, however, before completion of equipment installation, the applicant shall provide the Commission with a summary of the equipment which was actually installed.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File Nos. CSG-90-108-P/L, CSG-90-108-P/L(A)

Application for authority to construct and operate earth station facilities at Beeline, Florida for provision of multipurpose services via INTELSAT Atlantic Ocean Region Satellites.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by US Sprint Communications Company Limited Partnership (US Sprint), filed on April 3, 1990, and as amended on August 24, 1990 (CSG-90-108-P/L(A)) and December 26, 1990, requests authority pursuant to Sections 304, 308, 309, and 319 of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Beeline, Florida for the provision of multipurpose services via INTELSAT Atlantic Ocean Region (AOR) satellites. The application was placed on public notice on September 19, 1990. No comments were received.

2. The proposed earth station will consist of an 18.3 meter C-band antenna which shall meet INTELSAT Revised Standard A technical parameters and communicate with appropriate INTELSAT AOR satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The earth station will be located at Beeline, Florida, and US Sprint has completed the necessary frequency coordination in accordance with Section 25.203 of the Commission's Rules. However, international frequency coordination in accordance with Article 11 of the International Telecommunication Union (ITU) Radio Regulations has not been completed.

3. US Sprint's legal, financial and technical qualifications to construct and operate the proposed earth station facilities are established. US Sprint provides a wide range of international services and has been authorized to construct and operate other international earth station facilities.

4. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allows entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

5. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission stated that it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

6. Upon consideration of the application, we find that authorization of the requested earth station facilities and multipurpose services would serve the public convenience and necessity.

7. Accordingly, IT IS ORDERED that application File No. CSG-90-108-P/L, as amended, IS GRANTED and US Sprint is authorized to construct and operate the proposed 18.3-meter C-band earth station at Beeline, Florida to provide multipurpose services.[3]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that no service shall be provided via the subject earth station prior to grant of authority for such service pursuant to Section 214 of the Communications Act.

10. IT IS FURTHER ORDERED that US Sprint's earth station authorization is subject to coordination with other administrations in accordance with Article 11 of the ITU Radio Regulations.

11. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other autho-

rized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

12. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between US Sprint and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Earth Station Ownership*, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] This authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELECOMMUNICATIONS CORPORATION — File No. I-T-C-90-176

Application for authority to operate as an international resale carrier.

AMERICALL SYSTEMS OF LOUISVILLE — File No. I-T-C-90-177

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by American Telecommunications Corporation (ATC) and Americall Systems of Louisville (ASL), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on September 12, 1990. No comments were received.

2. The applicants are non-dominant domestic resale common carriers which now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] Upon review of the subject applications we find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by ATC and ASL.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-176 and I-T-C-90-177 ARE GRANTED; and

a. ATC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2 and MCI's Tariff FCC No. 1 between the U.S. and the points listed in those tariffs; and

b. ASL is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, n.2 (released April 4, 1986).

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CPS OPERATOR SERVICES, INC. File No. I-T-C-90-191

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed on September 24, 1990 by CPS Operator Services, Inc. (CPS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on October 4, 1990. No comments were received.

2. CPS is a domestic resale carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by CPS.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-191 IS GRANTED and CPS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE MICRONESIAN TELECOMMUNICATIONS CORPORATION — File No. I-T-C-91-010

Application for authority to acquire, install and operate a Digital Circuit Multiplication System and a Stratum 1 Clock.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by the Micronesian Telecommunications Corporation (MTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, install and operate one Digital Circuit Multiplication System (DCMS) and one Stratum 1 Clock to supplement its existing authorized services between the Commonwealth of the Northern and Mariana Islands and Japan, Hawaii and the continental U.S. The application was placed on public notice on October 18, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-010 IS GRANTED, and MTC is authorized to:

a. acquire, install and operate one DCMS and Stratum 1 Clock; and

b. use said facilities to provide MTC's regularly authorized services between the Commonwealth of the Northern Mariana Islands, on the one hand, and Japan, Hawaii and the continental U.S., on the other hand, and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX COMMUNICATIONS CORPORATION — File No. I-T-C-91-023

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned application requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on November 15, 1990. No comments were received.

2. Fox is a communications carrier providing domestic resale service. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Fox.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-023 IS GRANTED, and Fox is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GENCOM INC. File No. I-T-D-90-012

Application for authority
to close Maritime Mobile
Public Coast III-B Station
KPB685 at Palomar Mountain,
California.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on August 16, 1990 by Gencom Inc. (Gencom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from Maritime Mobile Public Coast III-B Station KPB685 at Palomar Mountain, California. The application was placed on public notice on September 5, 1990. No comments were received.

2. Station KPB685 is located 3.8 miles south of the Palomar Mountain Observatory in San Diego County and was licensed to serve commercial and non-commercial vessels out of Oceanside, California. At the time the station was licensed, Gencom states that the Oceanside port serviced not less than 10 commercial and 50 non-commercial radio-equipped vessels. The facility is designed to serve the coastal area extending seaward from the facility about 50 miles.

3. In support of its application for closure of Station KPB685, Gencom states that it has been operating the facility for more than five years and that during the past twelve months the facility has carried no traffic. Although Gencom states that it has no detailed information regarding the availability of other facilities to provide services similar to those contemplated when it constructed the facility, it believes that much of the marine traffic in this area has migrated to cellular radio. Gencom notes that both PacTel Cellular and U.S. West New Vector offer cellular telephone service in the area. According to Gencom, it has checked with the U.S. Coast Guard which indicated that there are two facilities in San Diego that provide distress coverage in the area served by the Gencom facility; one operated by the Coast Guard Group and the other operated by the Coast Guard Station. In view of these circumstances, Gencom requests authority to discontinue operation of Station KPB685.

4. The basic statutory test to be applied by the Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected by the proposed action." Application of this standard presents the Commission with the task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

5. Upon consideration of the application, we conclude that Gencom has met the basic statutory test for closing Station KPB685. Gencom has demonstrated that it is not carrying traffic and other facilities are available to serve its coverage area. In addition, distress service is provided by two U.S. Coast Guard locations. In view of these circumstances, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the instant station.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-90-012 IS GRANTED, and Gencom is authorized to discontinue service from Maritime Mobile Public Coast III-B Station KPB685 at Palomar Mountain, California.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 791 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-312

In the Matter of

Amendment of Section 73.202(b),	RM-6127
Table of Allotments,	RM-6135
FM Broadcast Stations.	
(Pearl and Magee, Mississippi)	

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Colon Johnston directed to the *Report and Order* in MM Docket No. 88-312 (*R&O*). [1] The *R&O* allotted Channel 230A to Magee, Mississippi. Airwaves Company ("Airwaves") filed an Opposition to the petition, and Johnston submitted a reply to that opposition.

2. In his petition, Johnston challenges our dismissal of his proposal to allot Channel 230A to Pearl, Mississippi. This proposal was one of two mutually exclusive proposals, the second of which, submitted by Airwaves, proposed the allotment of the same channel to Magee, Mississippi. An allotment of Channel 230A to Pearl would have provided that community with its first local aural service. However, as specified in the *Notice of Proposed Rule Making* (*NPRM*) [2] in this case, before a channel can be allotted, the original proponent must submit a statement of continuing interest affirming that it will apply for the station if its proposal is granted. In the *Report and Order*, the staff allotted the channel to Magee after concluding that Johnston had not filed the requisite expression of continuing interest and declaration of intent to apply for the channel at Pearl.

BACKGROUND

3. Johnston and Airwaves submitted proposals to have Channel 230A allotted to Pearl and Magee, respectively, and the Commission issued a *NPRM* setting forth both proposals and requesting comments. On the last day of the comment period, Johnston and Jerome Huey, licensee of Station WIZK, Channel 228A at Bay Springs, Mississippi, submitted what they termed a "counterproposal" with a cover letter attached thereto. In the cover letter, Johnston declared that he would apply for the Pearl channel, if allotted. However, even though the rules require that an original and four copies of a pleading be submitted [3] along with a certificate stipulating that service has been made to the other parties in the proceeding, it appears that only one copy of the counterproposal and cover letter were submitted. It also appears that only one copy of the certificate of service was submitted four days later.

4. In the counterproposal, Johnston and Huey proposed that Channel 230A be allotted to Pearl coupled with a scheme of allotments which would replace Channel 228A at Bay Springs with Channel 232C2. This latter substitution would free Channel 227A for allotment to Magee in lieu of Channel 230A. Johnston and Huey proposed, in the alternative, that Channel 227A be allotted to Mendenhall, Mississippi, instead of Magee. They cited Magee's existing local service and Mendenhall's lack of local service as reasons for their choice of Mendenhall over Magee for the allotment of Channel 227A. The counterproposal did not contain a statement of interest in filing an application for the Mendenhall allotment from either Johnston or Huey. Airwaves stated in its reply that the proposed scheme of allotments was acceptable to it in most respects. However, it objected to having Channel 227A allotted to Mendenhall since no party had expressed an interest in applying for a channel at that location.

5. The staff dismissed Johnston and Huey's counterproposal on several grounds. First, allotments for new communities were proposed and "neither expressions of interest nor indications that applications would be filed should channels be allotted to these communities were provided." Second, the staff concluded that Johnston and Huey had not submitted a certificate of service. For these reasons, the staff found the counterproposal to be unacceptable. In addition, Johnston's original petition to have Channel 230A allotted to Pearl was dismissed because it appeared that he had not submitted the required statement of interest in operating a station on that channel.

PETITION FOR RECONSIDERATION

6. The gravamen of Johnston's petition for reconsideration is his contention that he, in fact, had submitted a statement of continuing interest in the allotment at Pearl and thus, his proposal was erroneously denied on procedural grounds before the merits of the Pearl and Magee proposals could be considered. He includes as Attachment "A" a copy of the aforementioned cover letter and counterproposal. Johnston further contends that, even though the counterproposal was rejected, this fact alone is not sufficient to negate the validity of his statement of interest in the original proposal to allot a channel to Pearl. He asserts that, had the Pearl and Magee proposals been considered on their merits, a comparative analysis would have resulted in an award of Channel 230A to Pearl, thus providing that community with its first local radio service.

7. In a limited opposition to the petition for reconsideration, Airwaves addresses the proposal set forth in Johnston's counterproposal. Airwaves states that it opposes the allotment of 227A to Mendenhall because no expression of interest was filed for that allotment. It states that it would accept an award of Channel 227A to Magee, in lieu of Channel 230A, but it would prefer to have Channel 230A allotted to Magee since this was the channel originally sought and since it has already been allotted. Moreover, Airwaves prefers Channel 230A because site restrictions may have to be applied were another channel allotted to Magee and because it has already made considerable expenditures in preparing to apply for a license to operate on Channel 230A. Airwaves finally contends that, if Channel 230A is ultimately awarded to Pearl, Johnston should be required to reimburse Airwaves for monetary losses incurred in making these preparations.

8. In his reply, Johnston counters that Airwaves proceeded with its preparations at its own risk and that no precedent exists for the proposition that a party who ultimately prevails in a contested allotment case is liable to the losing party for its costs. Johnston also points out that Airwaves does not challenge his assertion that his expression of continuing interest in the allotment at Pearl was timely filed, or his contention that Pearl would receive preference over Magee in a comparison of the merits of each proposal.

DISCUSSION

9. We conclude that Johnston had submitted a statement of continuing interest in the cover letter to his counterproposal and that a certificate of service was submitted four days later. However, it appears that an insufficient number of copies of each of these documents was submitted. These copies were placed in the appropriate docket files, but no copies were then available to distribute to decision-making personnel. The rules specifically require that petitioners supply the Commission with an original and four copies of each filing so that this type of mishap might be avoided. Clearly then, Johnston has only himself to blame for his present predicament. Given the enormous number of documents filed with the Commission each day, were the staff required to makes copies for subsequent distribution, Commission efficiency would be greatly impaired. Had Johnston followed proper procedures, the Allocations Branch staff would have had all required documents at the time the decision to allot Channel 230A was made. Even so, because we were alerted to the problem before an application was granted for the allotment, and because it now appears that Johnston did submit a statement of continuing interest, we are prepared, in this case, to excuse the lesser infraction of the rules caused by Johnston's submission of insufficient numbers of copies of his counterproposal.

10. Given that Johnston's statement of interest in the allotment of Channel 230A to Pearl was included in the cover letter to the counterproposal, we conclude that the earlier allotment of Channel 230A to Magee, which was based on the belief that this statement had not been submitted, now must be rescinded.[4]

11. Having rescinded our previous action, the substantive issues regarding the allotment of Channel 230A, for which comments were sought in the *NPRM*, may now be addressed. Johnston argued that, based on Commission allotment policy, the channel should be awarded to Pearl because that community has no existing local radio service, and Magee does have one local station. We find his argument to be correct in that it clearly reflects our allotment priorities. These priorities, enunciated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), are as follows:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.[5]

Where the case arises, as it does here, that one proposal would provide a first local service to one community and another proposal would provide a second local service to another community, the Commission's policy is to allot the disputed channel to the community which would obtain its first local service.

12. In view of the above, we believe that the public interest would be better served by allotting Channel 230A to Pearl, since this would provide that community with its first local service. As stated in the *NPRM*, Channel 230A can be allotted to Pearl in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.1 kilometers (4.4 miles) northeast of the community.[6] Such a restriction will prevent a conflict with Station WHJT, Channel 228A, Clinton, Mississippi.

13. Finally, in response to Airwaves' claim that it should be reimbursed by Johnston for monies spent preparing to apply for a license to operate on Channel 230A at Magee, we note that there is no Commission policy of requiring reimbursement when mere applicants for a channel assignment are involved. Only licensees and permittees are afforded such protected rights.[7] Therefore, Johnston is not responsible for reimbursing Airwaves for its expenses.[8]

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Pearl, MS	230A
Magee, MS	298C

15. IT IS FURTHER ORDERED, That the window period for filing applications will open on **March 1, 1991,** and close on **April 1, 1991.**

16. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by certified mail, return receipt requested, a copy of this *Memorandum Opinion and Order* to the following:

Airwaves Company
P.O. Box 649
Magee, MS 39111

Jeanette Mathis
615 North Main
Magee, MS 39111

17. IT IS FURTHER ORDERED, That this proceeding is terminated.

18. For further information concerning the above, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] 4 FCC Rcd 1764 (1988).

[2] 3 FCC Rcd 4121 (1988).

[3] *See* 47 C.F.R. 1.420(e).

[4] In addition, it appears that one copy of the certificate of service which should have been submitted with the counterproposal was, indeed, filed. However, this fact only partially cures the otherwise defective counterproposal. Other reasons cited in the *R&O* for dismissing the counterproposal include the fact that new communities were introduced therein for which neither expressions of interest nor indications that applications would be filed should channels be allotted to these communities were provided. These are not minor infractions of the rules. Thus, we affirm the previous dismissal of Johnston's counterproposal.

[5] *See Dayton, Kettering, Moraine, Oakwood, and West Carrollton, Ohio*, 59 RR 2d 1676, 1677 (1986).

[6] The coordinates for Channel 230A at Pearl, Mississippi, are 32-15-07 and 90-03-41.

[7] *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

[8] However, deletion of Channel 230A at Magee, Mississippi, may entitle the two applicants for that channel -- Airwaves (BPH-890511MI) and Jeanette Mathis (BPH-890511MF) -- to a refund of filing fees pursuant to Section 1.1111(a)(4) of the Commission's Rules. Applicants seeking refunds may do so by letter directed to the Managing Director. A copy of this *Memorandum Opinion and Order* will be sent to each applicant.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-130

In the Matter of

Amendment of Section 73.202(b), RM-7160
Table of Allotments,
FM Broadcast Stations.
(Rockledge, Florida)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by D.V.R. Broadcasting ("petitioner") of the *Report and Order*, 5 FCC Rcd 5985 (1990), which dismissed its request for the substitution of Channel 274C2 for Channel 274A at Rockledge, Florida, and the modification of its construction permit for Station WHKR(FM) to specify operation on the higher class channel, based on a failure to show a continuing interest in the allotment.[1] Petitioner states that it filed comments restating its intention to apply for Channel 274C2, if allotted to Rockledge, and has furnished a copy of its comments showing a receipt date of May 11, 1990, by the Commission. Petitioner has, therefore, submitted proof that supporting comments were timely filed.

2. We believe the public interest would be served by substituting Channel 274C2 for Channel 274A at Rockledge since it would provide the community with an expanded coverage area FM channel. Channel 274C2 can be substituted for Channel 274A at Rockledge in compliance with the Commission's minimum distance separation requirements, with a site restriction of 24.2 kilometers (15.0 miles) north of the city.[2] In accordance with Section 1.420(g) of the Commission's Rules, we will modify the construction permit of Station WHKR(FM) to specify operation on Channel 274C2.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Rockledge, Florida	274C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permittee of Station WHKR(FM), Rockledge, Florida, IS MODIFIED, to specify operation on Channel 274C2 in lieu of Channel 274A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the Petition for Reconsideration was given on November 26, 1990, Report No. 1830.

[2] The coordinates for Rockledge are North Latitude 28-33-30 and West Longitude 80-48-00. Because the petition for rule making in this proceeding was filed prior to October 2, 1989, petitioner may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-74

In the Matter of

Amendment of Section 73.202(b),	RM-6440
Table of Allotments,	RM-6772
FM Broadcast Stations.	
(Bourbon and Columbia,[1] Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 31, 1990; Released: January 14, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Lake Broadcasting, Inc. ("Lake"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2527 (1989), proposing the allotment of FM Channel 244A to Bourbon, Missouri, as that community's first local service. Petitioner filed comments restating its interest in a channel at Bourbon. Ronald L. Peterson (Peterson) filed a counterproposal.[2] Petitioner and Peterson filed reply comments.[3]

2. Peterson counterproposed the substitution of FM Channel 244C2 for Channel 244A at Columbia, Missouri, and modification of the license for Station KCMQ(FM) to specify the higher class channel. According to Peterson, adoption of his counterproposal will enable Station KCMQ(FM) to compete more effectively against other Columbia stations and thus be in a financially stronger position to serve the public interest.

3. Lake, in reply comments, opposes Peterson's counterproposal. Lake notes that it is established Commission policy that a proposal, like Peterson's, to upgrade a channel to a higher class does not provide as great a public benefit as that of a new primary service. Lake further notes that Peterson has not provided a showing of need for the proposed increase in existing service or any data concerning what new areas are to be served and the extent to which these areas are currently unserved or underserved. Lake argues that Peterson has only provided unsupported generalities that an upgrade would enable Station KCMQ(FM) to serve a much wider area and greater population and enable it to compete more effectively against other Columbia stations. Lake continues to support Channel 244A at Bourbon and urges the Commission to dismiss Peterson's counterproposal.

4. Peterson, in his reply comments, proposes to eliminate the conflict between Bourbon and Columbia by substituting Channel 244C3 rather than 244C2 for Channel 244A at Columbia. Peterson indicates that he will promptly file an application for Channel 244C3 at Columbia. According to Peterson, Channel 244C3 can be allotted to Columbia and Channel 244A to Bourbon if the Bourbon allotment is made with a site restriction southwest of the community. Peterson requests adoption of his proposal as it would provide for the most effective utilization of Channel 244.

5. Lake concludes that its proposal to provide first local service to Bourbon without a site restriction should be adopted. Lake argues that the proposed site restriction on the Bourbon channel should be rejected as incompatible with the Commission's engineering, cross-ownership and application processing rules. Lake further argues that with the proposed site restriction, property is not available for installation of a transmitter, as all applicants for Channel 244A at Bourbon would need to locate the transmitter within the boundaries of the Onondaga Cave State Park (Vilander Bluff Unit). Lake adds that at the restricted site it could not file an acceptable application under Sections 73.315(a) and 73.3555(a)(2) of the rules, the city grade coverage and duopoly rules. Lake notes that it is the sole applicant for a station at Cuba, Missouri, a station close enough to Bourbon that the Commission's duopoly rule is implicated. The site restriction requires that applicants locate their transmitter sites closer to Cuba than would otherwise be necessary.

6. We believe the public interest would be served by allotting Channel 244A to Bourbon, Missouri, as that community's first local service. We also find that the public interest would be served by the substitution of Channel 244C3 for Channel 244A at Columbia, Missouri, and modification of the license for Station KCMQ(FM). Channel 244A can be allotted to Bourbon, Missouri, in compliance with the minimum distance separation requirements with a site restriction 8.4 kilometers (5.2 miles) southeast of the community.[4] The site restriction will avoid a conflict with Channel 244C3 at Columbia, Missouri. Channel 244A at Bourbon is currently short spaced to Station KNSX, Channel 244A, Steelville, Missouri. However, Station KNSX has been upgraded from Channel 244A to Channel 227C2, effective July 11, 1988. *See* 3 FCC Rcd 3073 (1988). Issuance of a license for Channel 244A at Bourbon may be withheld until the actual licensing of Station KNSX at Steelville on Channel 227C2. Our engineering analysis indicates sites are available for Channel 244A at Bourbon outside the boundaries of the state park and at locations which would allow compliance with Section 73.315(a) of the Commission's Rules. Channel 244C3 can be allotted to Columbia, Missouri, in compliance with the minimum distance separation requirements at Peterson's proposed site.[5] In accordance with Section 1.420(g) of the Commission's Rules, we shall modify the license of Station KCMQ(FM), Channel 244A, to specify operation on Channel 244C3.[6]

7. Although the *Notice* did not indicate a site restriction on the Bourbon allotment, to accommodate both Channel 244C3 at Columbia and Channel 244A at Bourbon, it is necessary to site restrict the Bourbon channel. The site restriction would allow efficient use of the spectrum, in that it would provide for both expanded service at Columbia and new service at Bourbon. We note Lake's concerns that it will not be able to apply for a maximally efficient facility at Bourbon because Lake is also an applicant for a station at Cuba, and, therefore, might be constrained by the Commission's duopoly rules. Although we share Lake's concern about compliance with our multiple ownership rules, and under some circumstances, might choose to disregard Lake's expression of interest due to the fact that Lake might not be able to effectuate its proposal in compliance with our rules, we believe there are sufficient

available means for Lake to comply with our rules and that disregarding Lake's expression of interest would be unwarranted. We decline to elevate Lake's site preference, which represents Lake's private interest and is only one of several potential means of avoiding potential multiple ownership considerations, into a factor altering our judgment as to the public's interest in the best overall use of the spectrum. We have consistently declined to consider one party's preference for a specific site as anything more than a private preference. *See Rockport, TX*, 4 FCC Rcd 8075 (1989). This approach is especially appropriate in this case, since the multiple ownership disability to which Lake refers would likely not apply to any applicant for the channel at Bourbon other than Lake.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Bourbon, Missouri	244A
Columbia, Missouri	230A, 244C3, 252C2, 268C2

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KCMQ(FM), Columbia, Missouri, IS MODIFIED to specify operation on Channel 244C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. The window period for filing applications for Channel 244A at Bourbon will open on **March 1, 1991** and close on **April 1, 1991.**

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, Return Receipt Requested, a copy of this Order to the following:

Twenty-one Sound Communications, Inc.
8422 N. Lindburgh
Steelville, Missouri 63031
(Licensee of Station KNSX-FM, Channel 244A)

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Columbia has been added to the caption.

[2] Public Notice of the counterproposal was given on June 2, 1989, Report No. 1781.

[3] The following comments were unauthorized or late filed: 1) Motion for Leave to File Responsive Pleading, and Response to Counterproposal and Reply Comments of Lake Broadcasting, Inc., filed by Donald W. Boyles, successor to Ronald Peterson; 2) Opposition to Motion for Leave to File Responsive Pleading and Motion to Strike and Opposition to Unauthorized Responsive Pleading of Boyles filed by Lake Broadcasting, Inc.; 3) Motion for Leave to File Amended Counterproposal filed by Donald W. Boyles; and 4) Opposition to Amended Counterproposal of Boyles filed by Lake Broadcasting. In accordance with Section 1.415(d) of the Commission's Rules, we shall not consider these pleadings.

[4] The coordinates for Channel 244A at Bourbon are 38-06-10 and 91-10-22.

[5] The coordinates for Channel 244C3 at Columbia are 38-58-01 and 92-18-39.

[6] Because these allotments are made as a result of petitions filed prior to October 2, 1989, the licensee of Channel 244A at Columbia and applicants for Channel 244A at Bourbon may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-409

Amendment of Section 73.202(b), RM-7344
Table of Allotments,
FM Broadcast Stations.
(Otterville, Missouri)

ERRATUM

Released: January 14, 1991

By the Acting Chief, Allocations Branch:

1. On December 18, 1990, the Commission released the *Report and Order*, DA 90-1806, in the above captioned proceeding. In the *Order*, at paragraph 3, the community is Otterville, Kansas. The state is incorrect. Paragraph 3 is hereby corrected to show Otterville, Missouri.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-559

In re Applications of

EDMISSON/EUBANK COMMUNICATIONS, INCORPORATED (hereafter "Edmisson")	File No. BPH-890117MM
T & M BROADCASTING, INC. (hereafter "T & M")	File No. BPH-890119MF
BAYARD H. WALTERS (hereafter "Walters")	File No. BPH-890119MG

For Construction Permit
for a New FM Station on
Channel 229A in Dickson, Tennessee

HEARING DESIGNATION ORDER

Adopted: October 26, 1990 **Released: January 15, 1991**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Financial.* The material submitted by the applicant below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency.

APPLICANT	DEFICIENCY
T & M	Applicant certifies that it is not financially qualified, but states that it believes it is financially qualified and is in the process of assembling appropriate documentation to support certification of its financial qualifications. No amendment was filed.

3. The engineering data submitted by Edmisson, T & M and Walters do not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that the 3.16 mV/m contour of all applicants is in substantial compliance with this requirement in that the 3.16 mV/m contours would cover approximately 80% of the community of license. Accordingly, no waiver is required.

4. Edmisson is the licensee of WDKN(AM), Dickson, Tennessee. Edmisson also provides management for Station WQZQ(FM), Dickson Tennessee, licensed to American Communications, Incorporated. Programming offered by WDKN(AM) is simulcast over the facilities of WQZQ(FM). Edmisson's connection with WDKN(AM) and WQZQ(FM) could violate the Commission's cross-interest policy. However, Edmisson has indicated its intent to terminate its relationship with Stations WDKN(AM) and WQZQ(FM) in the event of grant of its application. Accordingly, in the event of grant of Edmisson's application, it will be required to sever connections with stations WDKN(AM) and WQZQ(FM), Dickson, Tennessee prior to the commencement of program test authority.

5. Walters petitioned for leave to amend his application on July 27, 1989, September 20, 1989, and May 10, 1990. The accompanying amendments were filed after June 5, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and T & M have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by T & M would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the T & M would constitute a hazard to air navigation.

2. To determine with respect to T & M, whether the applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in the event of grant of Edmisson's application, Edmisson will be ordered to divest himself of all interests in and sever all connections with Stations WDKN(AM) and WQZQ(FM), Dickson, Tennessee prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Walters IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-584

In re Applications of

Angela M. Segal (hereafter: Segal) — File No. BPH-881026MA

Alfred T. Moore, Jr. and Elbert Wiggins Giles d/b/a NWLA Broadcasting Co. (hereafter: NWLA) — File No. BPH-881026MB

Marcus D. Jones d/b/a Fresh Radio (hereafter: Fresh) — File No. BPH-881026MG

M.S.C. Communications, Inc. (hereafter: MSC) — File No. BPH-881026MH

Homer Broadcasting (hereafter: Homer) — File No. BPH-881026MJ

For Construction Permit for a New FM Station on Channel 294C2 in Homer, Louisiana

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 15, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Homer.* Homer states that it plans to locate its transmitting antenna on an existing tower approximately 12 miles North-Northwest of Homer, Louisiana, a structure previously cleared (the applicant indicates) by Federal Aviation Administration study 85-ASW-0062-OE. Our Antenna Survey Branch records confirm a structure at this location. However, the 177 meters overall height of the tower above mean sea level listed in Homer's application differs from the 204.2 meters specified in our records. Further, the longitude plotted on Homer's transmitter site map (93 degrees-13 minutes-32.8 seconds) differs from that listed in both Section V-B, Item 2 of its application and in our Antenna Survey Branch records (93-degrees-13 minutes- *24* seconds). Since Homer clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower within Homer's application, the staff could confidently verify the tower's existence in the Commission's files for this facility. Therefore, the tower height and coordinate discrepancies do not render Homer's application unacceptable for filing. However, it will be required to submit the appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Homer has not completed Item 4 correctly. Homer's application gives a post office box number as the residence address for Murry Powell. Accordingly, Homer must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *MSC.* MSC states that it proposes to place its transmitting antenna on a new tower to be constructed approximately 4.25 kilometers Northeast of Minden, Louisiana. However, there is a discrepancy between the 131 meters tower height above ground level listed in Section V-B, Item 7(a)(2) of MSC's application and the 152 meter height displayed in its antenna sketch (Exhibit VB-2). While this discrepancy does not affect the acceptability of MSC's application, the applicant will be required to submit the appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Other Matters.* Attempts to obtain FAA clearance for Fresh and MSC through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Fresh and MSC would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Fresh and MSC would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Homer must submit the amendment noted in paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That Homer shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That MSC must file the amendment described in paragraph 4 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-397

In re Application of

KOZN FM STEREO 99 LTD.,
Debtor in Possession

Licensee of Radio Station KOZN(FM)
Imperial, California

Order to Show Cause why The License
Of KOZN(FM), Imperial, California
Should Not Be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Commission:

1. Before the Commission are a Trustee's Second Petition for Extraordinary Relief filed October 29, 1990 by the Trustee in Bankruptcy for Stereo 99, Ltd. (Stereo), licensee of radio station KOZN(FM).[1] The petition seeks permission to assign the license for KOZN(FM) to Acacia Amusement Corporation (Acacia). We will grant the requested relief.

BACKGROUND

2. On May 3, 1990, the Commission approved the Bankruptcy Trustee's Petition for Extraordinary Relief and authorized the assignment of the license of radio station KOZN(FM) to New World Communications. *KOZN*, 5 FCC Rcd 2849 (1990). The action taken by the Commission was conditioned, however, as follows:

> IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, provided that if the application from the Bankruptcy Trustee to New World Communications, Inc., is denied, or the assignment to New World Communications, Inc., is not consummated, the action taken herein shall be void.

Id. at 2850 ¶ 10. The sale to New World was not consummated and the Bankruptcy Trustee is before us again with a new request.

3. In the bankruptcy court's order approving the sale to Acacia, the court notes that it's previous order approving the sale to New World authorized the Trustee to sell to the next highest and willing bidder in the event the sale was not consummated. Supplement to Trustee's Second Petition for Extraordinary Relief at 2. Acacia was the third highest bidder in that auction and the second highest bidder failed to indicate interest. *Id.*

DISCUSSION

4. As in its previous petition, the Trustee requests permission to assign the license of KOZN(FM) pursuant to the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). This policy allows assignment when outstanding questions exist about a licensee's basic qualifications if the following conditions are met:

> [T]he individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [assignment] applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. [citations omitted]

22 FCC 2d at 516 ¶ 5.

5. The purchase agreement in the case previously before us provided for a payment of $255,000 to Stereo and the estimated total of all creditor claims against Stereo was $257,057.94. The agreement was modified to provide that Stereo waived all rights to receive any proceeds from the sale of KOZN and any excess funds from the sale would be held in a blocked account subject to the determination of the FCC and the bankruptcy court as to how the funds should be appropriated. *See* 5 FCC Rcd at 2849 ¶ 6. The sale was approved by the bankruptcy court.

6. As reflected in the pleadings before us now, the bankruptcy trustee has entered into an agreement with Acacia to sell the assets of KOZN for $250,000. The proceeds from the sale plus $20,000 (cash-on-hand) would be available to pay approximately $280,000 in total claims against the estate. The bankruptcy court has approved the sale. *See* Supplement to Trustee's Petition for Extraordinary Relief at 4.

7. The terms of the requested sale are substantially the same as those contained in the prior unconsummated agreement that we approved.[2] Richard Green, Stereo's general partner, will have no part in the future operation of KOZN(FM) and, because the sale price is less and the claims are more than those in the case we approved before, there is less chance that any money would be left over after satisfaction of all the claims. Even so, this agreement contains a provision, just as did the previously approved agreement, precluding the payment to Mr. Green of any funds from the sale. *See* paragraph five, above.

8. These facts justify the application of the *Second Thursday* policy. As presently structured, the current licensee's general partner will receive only an incidental benefit from the sale through the elimination of his potential secondary liability. The innocent creditors may well be paid in full. Under these circumstances, we will grant the petition for extraordinary relief. [3]

9. ACCORDINGLY, IT IS ORDERED, That the Trustee's Second Petition for Extraordinary Relief, filed October 29, 1990, by the Trustee in Bankruptcy for KOZN(FM) Stereo 99, Ltd. as amended by the Supplement to Trustee's Second Petition for Extraordinary Relief filed on November 5, 1990, IS GRANTED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, provided that if the application for assignment from the Bankruptcy Trustee to Acacia

Amusement Corporation is denied, or the assignment to Acacia Amusement Corporation is not consummated, the action taken herein shall be void.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In addition, the Trustee in Bankruptcy filed a Supplement to Trustee's Second Petition for Extraordinary Relief on November 5, 1990, and the Mass Media Bureau filed Comments in Support of Trustee's Second Petition for Extraordinary Relief on November 14, 1990.

[2] Other than the sale price and the increase in the amount of claims, the only significant difference is that the buyer may withdraw from the proposed sale if a mutually exclusive application is filed against KOZN's renewal.

[3] An application to assign the license of KOZN(FM) to Acacia Amusement Corporation (BALH-901030GR), filed by the Trustee on October 30, 1989, is pending before the Mass Media Bureau. Because the Bureau has not yet passed on Acacia's qualifications to be a licensee, we will terminate this proceeding conditioned on the approval of the assignment application and the consummation of the assignment to Acacia.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-308

In re Application of

REAL LIFE EDUCATIONAL FOUNDATION OF BATON ROUGE, INC. — File No. BPED-840322CA

JIMMY SWAGGART MINISTRIES — File No. BPED-840822IF

For Construction Permit for a New Noncommercial Educational Broadcast Station, Channel 203C2, in Baton Rouge, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1991; Released: January 16, 1991

By the Commission:

1. In his *Initial Decision*, Administrative Law Judge Richard L. Sippel (ALJ) granted the application of Jimmy Swaggart Ministries (JSM), in the above-captioned noncommercial educational comparative proceeding. 4 FCC Rcd 8433 (Admin. L.J. 1989). Real Life Educational Foundation of Baton Rouge, Inc. (Real Life) filed exceptions claiming, in part, that the ALJ erred by failing to consider diversification of media interests as a necessary criterion in the comparative evaluation of noncommercial applicants.[1] *Id.* at 8433 ¶ 4.

2. Subsequent to the filing of the pleadings before the Board, the Commission released its decision in *Valley Broadcasters*, 5 FCC Rcd 2785 (1990). The Board characterized the opinion as containing "a historic policy revision" terminating the practice of "ignoring noncommercial stations" in the ordinary transmission service analysis required under 47 U.S.C. § 307(b).

3. The Board acknowledges that *Valley Broadcasters* did not directly overrule *New York University*, 10 RR 2d 215 (1967), which held that diversification and other standard comparative criteria applicable to commercial comparative proceedings were "meaningless" in noncommercial educational comparative proceedings. However, the Board opines that *Valley Broadcasters* "may also be read to recognize noncommercial 'voices' in a manner that impacts upon the *New York University* view of diversity." *Real Life*, 5 FCC Rcd at 3421 ¶ 8.

4. Therefore, based on its uncertainty as to the policy implications of *Valley Broadcasters* beyond section 307(b), the Board certified the following question to the Commission:

> Should the co-ownership of other media "voices" (commercial or noncommercial) now be recognized as a comparative factor in contests for noncommercial frequencies.

5 FCC Rcd 3420, 3421 ¶ 8 (Rev. Bd. 1990).

5. Comments were subsequently requested from the parties to permit them to express their views concerning the certified question. FCC 90I-100, released September 10, 1990. Comments were filed by JSM on September 24, 1990 and by Real Life and the Mass Media Bureau on September 25, 1990.[2]

6. Real Life follows the lead offered by the Board and submits that the Commission's action in *Valley Broadcasters* supports not only the inclusion of noncommercial stations for 307(b) analyses but also the removal of distinctions between commercial and noncommercial stations in the comparative process as well. Real Life argues that the Commission, in *Valley Broadcasters*, did no more than recognize a reality -- noncommercial stations are media voices. Real Life Comments at 13. Furthermore, it asserts that viewpoint diversity among media voices is a fundamental and preeminent goal of broadcast regulation and, therefore, the failure to consider diversification in the comparative consideration of noncommercial applicants is arbitrarily inconsistent with that goal. Real Life Comments at 14-16.

7. The Mass Media Bureau argues that our holding in *Valley Broadcasters* does not compel the sweeping policy consequence that concerns the Board. Bureau Comments at 2. The Bureau suggests that specific rule changes relating to power, minimum hours of operation and issue-responsive programming for noncommercial stations were the basis of the Commission's decision in *Valley Broadcasters*. The question certified to the Commission, however, asks whether diversity should be added to the criteria for resolving noncommercial educational comparative hearings. The Bureau argues that diversity is a corollary of the multiple ownership rules, which are not applicable to noncommercial broadcasters. *See* 47 CFR § 73.3555(f). Any application of diversification to noncommercial contests would, in its view, require a change in the multiple ownership rules to include noncommercial broadcasters, and such sweeping changes in Commission policy should only be accomplished on the basis of a complete record developed through Rule Making. Bureau Comments at 3. Therefore, it is the Bureau's view that the Commission's opinion in *Valley Broadcasters* does not, in and of itself, provide an adequate basis to change long standing Commission precedent such as that enunciated in *New York University* and its progeny.

8. JSM argues that *Valley Broadcasters* does not provide a basis for a change in the comparative criteria applicable to noncommercial educational proceedings because: (1) adding the diversification criterion will fundamentally change the character of all future noncommercial applicants and the matter is, therefore, more properly suited for a Rule Making proceeding; (2) nothing in *Valley Broadcasters* suggests that the Commission should abandon the essential distinctions between commercial and noncommercial services in noncommercial comparative cases; and (3) even if the Commission is of the opinion that the noncommercial comparative process should be modified, the prudent course would be to develop a new

set of criteria for the assessment of competing applicants based on a Rule Making proceeding that would provide sufficient data for a complete evaluation of the changing nature of noncommercial stations. JSM Comments at 3.

DISCUSSION

9. After review of the Board's decision and all of the related pleadings before us, we conclude that our holding in *Valley Broadcasters* is distinguishable from the issues inherent in the question posed by the Board and that the public interest would not be served by expanding that holding in this case.

10. Of the issues before the ALJ, the following is pertinent:

> 1. To determine . . . (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational service.

Real Life, 3 FCC Rcd 4359 (MMB July 20, 1988).

11. These issues are commonly designated in noncommercial educational comparative proceedings and have been since first enunciated in *New York University*, 10 RR 2d at 218. In that case we indicated that the purpose for establishing FM educational reservations was to make facilities available to the applicant for the advancement of its educational work and for the transmission of educational and entertainment programs to the general public. 10 RR 2d at 217. In addition, we also noted that our rules provided that a noncommercial station would be licensed "only to an organized non-profit educational agency and upon a showing that the station will be used for the advancement of the agency's educational program." [3] Thus, both the purpose and the eligibility requirements were distinctly different from those for commercial allocations.[4]

12. It was in recognition of those basic differences that we held that the standard comparative criteria applicable to commercial proceedings, such as local residence, integration, broadcast experience, and diversification, were "virtually meaningless" in noncommercial educational proceedings. 10 RR 2d at 217.

13. Real Life applied for a license to operate a station on a channel reserved for noncommercial educational service. Because a central purpose for setting aside the channels was to assist educational entities advance their educational work, the number of other stations owned by an applicant, commercial or noncommercial, is irrelevant to the determination of which applicant would best serve that purpose. Although Real Life argues that the differences between noncommercial and commercial stations have disappeared, it has failed to demonstrate that this central purpose has been eroded in any way, and thus it has also failed to provide any reason to change the criteria relevant to this case.

14. It is in this context, then, that we review our decision in *Valley Broadcasters*. At the outset, it is clear that *Valley Broadcasters* did not involve an analysis of the standard comparative criteria. It simply reviewed the status of noncommercial stations in connection with our policy of excluding noncommercial educational stations from the 307(b) transmission analysis. Past cases enunciating that policy had relied primarily on a footnote in the Commission's rules, subsequently deleted. *Valley Broadcasters*, 5 FCC Rcd at 2787 ¶¶ 23-24. That footnote provided that noncommercial educational stations were not to be considered for the purpose of determining whether an AM application met certain requirements to provide a community with a first or second authorized aural transmission service. Given the elimination of the pivotal footnote in 1985, we held that the past cases were no longer valid. *Id.* at 2788 ¶¶ 25-26.

15. Thus, in the determination of which community has the greatest need for commercial broadcast transmission facilities, we said that noncommercial stations should not be automatically excluded from the 307(b) analysis. *Id.* at ¶ 26. But it does not necessarily follow, as suggested by Real Life, that by including noncommercial stations in the 307(b) analysis for commercial stations, the Commission necessarily has altered the basic purpose for the reservation of noncommercial educational channels.[5]

16. Real Life also argues that the Commission's recent decision in *Kargo Broadcasting, Inc.*, 5 FCC Rcd 3442, 3445, n.11 (1990), eliminates the ownership distinction between commercial and noncommercial stations. *See* Real Life Comments at 10. We disagree. Not unlike our decision in *Valley Broadcasters*, we said in *Kargo* that although noncommercial stations are not counted for multiple ownership purposes, they were properly included in that case in analysing the effect that the addition of a commercial FM station would have on competition and overall market influence. Ownership of noncommercial stations may affect competition and overall market influence in the context of the acquisition of a new commercial station. It does not follow, however, that the ownership of commercial stations necessarily should affect the licensing determinations to be made for a noncommercial station in light of the distinct and different purposes for the establishment of reserved channels for noncommercial educational stations. *See* paragraph 11, *supra*.

17. In light of the above, we are convinced that our holding in *Valley Broadcasters* need not, and should not, in the context of this case, be interpreted as removing the distinctions between commercial and noncommercial licensing procedures. As noted, *supra*, ¶¶ 14 & 15, *Valley Broadcasters* was limited to whether noncommercial stations should be considered in Section 307(b) analyses. Nothing in its rationale compels the automatic application of comparative policies governing commercial applications to noncommercial comparative cases which, as noted above, involve policy considerations that are quite distinct. In recognition of those differences, we have consistently applied the separate criteria outlined in *New York University* which exclude diversity of programming from comparative noncommercial educational proceedings.[6] The issues designated for resolution of this proceeding were based on those criteria. We find no public interest reason to modify the criteria recognized as comparative factors in an individual contest for a noncommercial educational license.

18. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Brief filed July 23, 1990 and corrected July 24, 1990 by Arizona State University, the Petition to Accept Amicus Brief of Public Broadcasting Entities filed August 1, 1990, and Motion of Association

for Public Broadcasting for Leave to File Comments as Amicus Curiae filed August 9, 1990 ARE GRANTED; that the Brief filed July 23, 1990 and corrected July 24, 1990 by Arizona State University, Amicus Comments filed July 23, 1990 and corrected July 24, 1990 by National Public Radio, Amicus Brief of Public Broadcasting Entities filed August 1, 1990 and Comments of Amicus Curiae Association for Public Broadcasting filed August 9, 1990 ARE ACCEPTED; and that this matter IS REMANDED to the Review Board for consideration of the matters pending before it in this proceeding consistent with this opinion.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Real Life has no other media interests and JSM owned and operated six commercial radio stations and produced a daily 30-minute and a weekly one-hour program at the time the applications were filed.

[2] Earlier, and prior to the comment process, amicus pleadings were filed by: (1) Arizona State University (ASU) on July 23, 1990; (2) National Public Radio (NPR) on July 24, 1990; (3) Public Broadcasting Entities (PBE) on August 1, 1990; and (4) The Association for Public Broadcasting (APB) on August 9, 1990. These pleadings all recommend making no change in the current comparative hearing process for noncommercial educational stations without first allowing for public notice and comment.

[3] The current rule, 47 C.F.R. § 73.503, reads as follows:

> A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.

[4] Although the Commission noted that there was an unresolved question as to whether the reservations were intended strictly as educational tools or to serve both that function and to serve as additional available broadcast outlets, there was no question that their purpose was distinct from that of commercial operators. *New York University*, 10 RR 2d 215, 217 ¶ 7 (1967).

[5] In this connection we have recently terminated a Rule Making proceeding seeking to determine whether the multiple ownership rules should be expanded to include noncommercial FM and TV stations without adopting any modifications thereof. *In the Matter of Amendment of the Commission's Multiple Ownership Rules to Include Educational FM and TV Stations*, Docket No. 78-165, 68 FCC 2d 831 (1978), proceeding terminated without prejudice, 5 FCC Rcd 392 (1990).

[6] *See* note 5, *supra, and Seattle Public Schools*, 4 FCC Rcd 625, 643 ¶ 74 (Rev. Bd. 1989) affirming that the comparative criteria adopted in *New York University* excluded the "standard comparative criteria (local residence, integration, broadcast experience, diversification, etc.)" as meaningless in noncommercial educational comparative proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIGITRAN CORPORATION — File No. I-T-C-91-021

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by Digitran Corporation, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services of other common carriers to provide switched voice and facsimile services between the U.S. and overseas points listed in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Cable and Wireless' Tariff FCC No. 3. The application was placed on public notice on October 31, 1990. No comments were received.

2. Digitran, a Delaware Corporation, proposes to provide international voice and facsimile service between the U.S. and international points through the resale of the services of underlying common carriers authorized to provide International Message Telephone Service (IMTS). Digitran believes that the data market between the United States and foreign points is growing and will continue to grow significantly and that additional competition in these markets is therefore feasible and will stimulate new demand. In authorizations of new entrants over the past decades, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international voice and facsimile service by Digitran between the United States and those international points named in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Cable and Wireless' Tariff FCC No. 3.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-021 IS GRANTED, and Digitran is authorized to provide international voice and facsimile service by the resale of the International Message Telephone Service set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Cable and Wireless' Tariff FCC No. 3 between the contiguous U.S. and those international points named in the underlying tariffs.

5. IT IS FURTHER ORDERED that Digitran shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1989).

8. IT IS FURTHER ORDERED that Digitran is limited, under this order, to the provision of international voice and facsimile services only. Nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-603

In re Applications of

GRANTS PASS BROADCASTING, CORP. (hereafter: Grants) File No. BPH-890428MD

E. LARA SHAINIS (hereafter: Shainis) File No. BPH-890505MA

For Construction Permit
for a New FM Station on Channel 252A
in Harbeck-Fruitdale, Oregon

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 16, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

DAVID R. WILLIAMS, d/b/a INDUSTRIAL COMMUNICATIONS, INC.

File No. 24622-CD-P/L-01-87

For authority to construct a new one-way facility in the Public Land Mobile Service operating on frequency 152.24 MHz at Provo, Utah

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 31, 1990; Released: January 16, 1991

By the Deputy Chief, Common Carrier Bureau:

1. David R. Williams d/b/a Industrial Communications, Inc. (Industrial) has filed a petition for reconsideration of the Mobile Services Division (MSD) action dismissing its Provo, Utah application.[1] Daniels and Associates Inc. d/b/a Interlink Communications of Utah (Interlink) filed an opposition to the petition for reconsideration and Industrial filed a reply. We deny reconsideration for the reasons stated below.

I. BACKGROUND

2. On June 8, 1987 Industrial filed an application to provide service on frequency 152.24 MHz at Provo, Utah. Interlink filed a petition to deny Industrial's application on July 27, 1987. On August 12, 1987 Interlink filed an application for additional facilities on frequency 152.24 MHz for Station KRS691 at Provo. Interlink's application for additional facilities for Station KRS691 was designated as mutually exclusive with Industrial's Provo application by Public Notice on January 13, 1988.

3. In its petition to deny, Interlink argued that Industrial's proposal would cause harmful electrical interference to its existing co-channel facilities at Garfield and Ensign Peak, Utah. The MSD dismissed as defective Industrial's application because Industrial had not demonstrated that its proposed facilities would not cause harmful electrical interference to Interlink's co-channel facilities as required by Section 22.15 of the rules.[2]

II. CONTENTIONS OF THE PARTIES

4. In its petition for reconsideration, Industrial maintains that the dismissal of its application was arbitrary and capricious and that the order should be rescinded and Industrial's application reinstated *nunc pro tunc*. Industrial argues that it did not submit the manufacturer's description of the expected antenna pattern because this submission is not required by Section 22.15 of the rules. In addition, Industrial maintains that the MSD, contrary to established procedures and precedents, did not formally request Industrial to submit additional information pursuant to Section 22.13(c)(2) of the rules. Industrial argues that the MSD's decision, without seeking this additional determinative information, was unfair, unreasonable and a violation of due process of law.

5. In its opposition, Interlink argues that the petition for reconsideration should be summarily denied because it is procedurally and substantively defective. According to Interlink, the petition refers to factual matters (the antenna pattern) which have been available or could have been produced by Industrial for MSD consideration during the proceeding. By failing to produce such evidence, argues Interlink, Industrial has forfeited its right to do so. In addition, Interlink maintains that the MSD was not specifically required to request a manufacturer's antenna pattern from Industrial before dismissing its application.

6. In its reply, Industrial argues that doubts on an antenna pattern raised by a petitioner do not impose a duty on the applicant to submit evidence not otherwise required by the rules.

III. ADDITIONAL INFORMATION

7. On February 27, 1989, the MSD, although not specifically required to do so by the rules (*see* discussion paragraph 11, *infra*) sent a letter to Industrial requesting it to send a measured pattern for the proposed antennas and a description of the mounting, phasing, and power distribution of the proposed antennas. In addition, the staff requested a description of all nearby structures including their height, composition, and distance and direction from the proposed site.

8. In response to this letter Industrial filed an amendment to its application on March 29, 1989, which included an engineering statement from David Carter, its consulting engineer. In its amendment, Industrial contends that it would have to expend significant financial resources to submit the information requested by the Commission. According to Industrial, this is an onerous burden it is not prepared to undertake and which is not justified by the circumstances in question. Industrial informed the Commission it was relying on its original submission in the proceeding. In addition, Industrial maintains, that the techniques and calculations proposed in its application are not unusual and have been authorized by the Commission in other applications. [3]

IV. DISCUSSION

9. After a thorough analysis of the facts in this case we find that the MSD decision returning Industrial's application as defective was correct. The factual record developed in the proceeding supports the finding that Industrial had not demonstrated interference-free operation as required by Section 22.15 of the rules because of the questionable performance characteristics of its proposed composite antenna array. In these circumstances, it is correct for the staff to rely on the applicant to submit the manufacturer's description of the expected antenna pattern to help it make its own determination. *See Beep Beep Suncoast*, 3 FCC Rcd 1646 (Mob. Serv. Div. 1988) (in cases where there are disputes involving antenna patterns, the staff will rely on the description of the expected antenna pat-

tern from the manufacturer in resolving the dispute). To this day, Industrial has failed to provide the manufacturer's description of the expected antenna pattern in support of its proposal.

10. Although the rules do not specifically require applicants to submit the manufacturer's description of the expected antenna pattern, the burden of proof is on the applicant to demonstrate interference-free operation. In cases such as this one, where allegations are raised in a petition to deny questioning whether an interference-free showing has been made, it is the duty of the applicant to respond to these allegations. This duty includes the submission of any relevant evidence necessary to prove its case, even if such evidence is not specifically required by the rules. Section 22.15 requires that applications comply with all technical requirements, including demonstrating interference-free operations.[4] Section 22.20 of the rules requires that applications be complete when filed. In addition, Section 1.65 of the rules requires that applicants maintain their applications substantially accurate and complete. Industrial did not comply with these requirements. Finally, the applicant in this case had been put on notice by previous Commission pronouncements that we would rely on the manufacturer's description of the expected antenna pattern as the best evidence to resolve the dispute.[5] Industrial's technical information, contained in its application, is not sufficient to demonstrate interference free operations. In these circumstances, we conclude that the MSD was legally justified in dismissing Industrial's application for failure to demonstrate interference-free operation.

11. We also reject Industrial's assertions that MSD was obligated to request the manufacturer's antenna pattern before dismissing Industrial's application. Although the staff may require additional information to assist it in processing applications,[6] it is under no obligation to do so. It is the duty of the applicant to file complete applications and the staff is not required to give applicants an opportunity to amend defective proposals before they are dismissed.[7] Moreover, the Commission's rules state that defective applications will be dismissed. *See* Section 22.20 of the rules. In this case, the applicant failed to submit the necessary evidence to refute the allegations of harmful interference and therefore did not comply with the requirements of Section 22.15 of the rules.[8] Accordingly, its application was properly dismissed under Section 22.20 of the rules.[9]

V. CONCLUSION

12. It is the burden of the applicant to demonstrate interference-free operation. Under these circumstances, where Industrial has failed to meet its burden of proof that its proposal will not cause harmful electrical interference, we find that the MSD's decision was correct and did not deny Industrial due process of law. We affirm its decision.

VI. ORDERING PARAGRAPH

13. WHEREFORE, the foregoing premises considered, IT IS HEREBY ORDERED that the Petition for Reconsideration filed by David R. Williams, d/b/a Industrial Communications, Inc. IS DENIED and the Mobile Services Division's dismissal of David R. Williams, d/b/a Industrial Communications, Inc.'s application File No. 24622-CD-P/L-01-87 IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief (Operations)
Common Carrier Bureau

FOOTNOTES

[1] *David R. Williams d/b/a Industrial Communications Inc. (Williams)*, 3 FCC Rcd 6646 (Mob. Serv. Div. 1988).

[2] Specifically, Interlink argued that Industrial's proposal was not supported by generally accepted engineering principles regarding the operational performance of its directional antenna. The MSD found that where there are disputes involving antenna patterns, the manufacturer's description of the expected antenna pattern is critical to evaluating the interference potential of the proposed facility. In this case Industrial had not submitted the manufacturer's pattern for the proposed antenna with its application. The MSD concluded that without actual measured values from the manufacturer, Industrial had not demonstrated interference free operation. *Williams*, 3 FCC Rcd at 6646.

[3] On April 10, 1989 Interlink filed an Opposition to Minor Amendment. Interlink maintains that the submission by Industrial fails to respond to the request. Industrial filed a Response to Opposition to Minor Amendment on April 25, 1989. In its response Industrial argues that the opposition is an unauthorized pleading and should be rejected on procedural grounds. On substantive grounds the pleading should be dismissed as repetitious, Industrial maintains. We will not consider these pleadings in this proceeding because they are not authorized. *See* Section 22.30(b) of the rules. Moreover, the pleadings are repetitious and do not add any material facts beyond those already presented warranting consideration.

[4] Section 22.15(j)(4) specifically requires the applicant to file information regarding antenna radiation patterns.

[5] *Beep Beep Suncoast*, 3 FCC Rcd 1646 at n. 3.

[6] Section 22.13 (c) (2) provides, "In addition . . . applicants shall submit any additional documents, exhibits, or signed written statements of fact: . . . (2) as the Commission, at any time after the filing of an application . . . may require . . . . to enable it to determine whether a radio authorization should be granted, denied, or revoked.

[7] *Compare Moore's Service* 86 FCC 2d 787, 795 (Com. Car. Bur. 1981), cited with approval in *David R. Williams d/b/a Industrial Communications*, 53 Rad. Reg. 2d (P&F) 38, 42 (1983), *aff'd sub nom. Williams v FCC*, No. 83-1233 (D.C. Cir. November 30, 1983) (a defective Public Land Mobile application which has been returned must be retendered with a curative amendment prior to the cut-off date in order to be entitled to comparative consideration). *See also Ram Mobile Communications of Colorado Inc.*, 2 FCC Rcd 86 (1987).

[8] In this case, Industrial was given an additional opportunity to submit evidence in support of its proposal. It refused to do so because it would be expensive to comply with the request. Its concern over making monetary expenditures to prove its case cannot excuse its lack of compliance with Commission requests.

Its refusal to respond to the MSD request constitutes an independent ground for dismissal of its application. *See* Section 22.20(d) of the rules.

[9] The fact that we may have granted uncontested applications in the past with similar technical proposals cannot be determinative in this case where the antenna patterns are disputed and a petition to deny has been filed based on allegations of harmful electrical interference. In addition, the mere fact that other applications with similar technical proposals may have been granted does not serve as a precedent to allow the use of a defective interference showing in this contested proceeding. *See generally Clyde W. Pierce*, 4 FCC Rcd 2378 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-651

In the Matter of

Amendment of Section 73.202(b), RM-7544
Table of Allotments,
FM Broadcast Stations.
(Bald Knob and Clarendon, Arkansas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: December 24, 1990; Released: January 17, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Capps Radio Company (petitioner), licensee of Station KKSY(FM), Bald Knob, Arkansas, requesting the substitution of Channel 296C3 for Channel 296A at Bald Knob, and modification of its license accordingly to specify operation on the higher powered channel. In order to accommodate the request in conformity with the Commission's minimum distance separation requirements, petitioner also requests the substitution of Channel 281A for Channel 297A at Clarendon, Arkansas. Petitioner stated its intention to apply for Channel 296C3 if allotted.

2. A staff analysis reveals that Channel 296C3 can be substituted for Channel 296A at Bald Knob at the petitioner's suggested site located 22.8 kilometers (14.2 miles) southwest of the community.[1] Additionally, Channel 281A can be substituted for Channel 297A at Clarendon, Arkansas, at the authorized site of B&H Broadcasting Co. ("B&H") the permittee of Channel 281A.[2]

3. Although the Bald Knob proposal complies with Section 73.207(b) of the Commission's Rules, we question whether, at the petitioner's specified site, the requirements of Section 73.315 of the Commission's Rules could be met. In this regard, we note that, at the rule making stage, a Class C3 allotment is assumed to provide a 70 dBu service to the entire community of license where the transmitter is located no more than 23.2 kilometers (14.4 miles) from the community's furthest point. Petitioner recognizes that its proposal specifies a transmitter site that is located at the outer limits for a Class C3 operation. Petitioner states that with an average terrain computed at 244 feet (74.3 meters) and an antenna height of 572 feet (174.3 meters), the station could operate at 25 kW and an antenna height above average terrain of 100 meters. It further contends that the 70 dBu contour of Channel 296C3 would extend 15.2 miles (24.5 kilometers) "in the direction of Bald Knob."

4. In *Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988), the Commission set forth a limited exception to its allotment policy of predicting city-grade coverage based upon the assumption of uniform terrain rather than an analysis of the terrain characteristics of specific radials. This exception applies only where the new allotment will not be available for competing applications. Petitioner's request falls within this exception and thus warrants further exploration. Assuming petitioner is correct in its assertion concerning the provision of the required 70 dBu signal, it failed to provide a map reflecting that compliance with the requirements of Section 73.315 could be met from its specified site, and should do so in response to this *Notice*. Moreover, petitioner is requested to provide additional information demonstrating that it has taken positive measures to obtain assurances from the owner of the proposed site that it will be able to buy or lease the location specified in its petition, as well as FAA approval for a tower. Absent such showings, the requested upgrade may not be permitted.

5. We believe the public interest would be served by the proposal since it could enable Station KKSY(FM) to provide an expanded coverage area FM service to the community. Since the petitioner's modification request at Bald Knob, Arkansas, conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KKSY(FM) without entertaining other expressions of interest. In addition, we shall direct an *Order to Show Cause* to the permittee at Clarendon, Arkansas, why its permit (File No. BPH-891002MN) should not be modified to specify operation on Channel 281A in lieu of Channel 297A.

6. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred. In this instance, petitioner stated its willingness to reimburse B&H, as an applicant, for its reasonable costs incurred in moving to Channel 281A. Since H&B was accorded permittee status prior to the adoption of this *Notice*, it is entitled to reimbursement for the reasonable and prudent costs associated with the requested frequency change. Petitioner is requested to state its willingness to reimburse B&H for the reasonable costs to be incurred in moving to Channel 281A if this proposal is ultimately adopted.

7. In view of the above, the Commission believes it is appropriate to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Bald Knob, Arkansas	296A	296C3
Clarendon, Arkansas	297A	281A

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, B and H Broadcasting Co., permittee of Channel 297A, Clarendon, Arkansas SHALL SHOW CAUSE why its permit (File No. BPH-891002MN) should not be modified to specify operation on Channel 281A in lieu of Channel 297A.

9. Pursuant to Section 1.87 of the Commission's Rules, B and H Broadcasting Co. may, not later than **March 11, 1991,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on B and H Broadcasting Co. to furnish additional information. If

B and H Broadcasting Co. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, B and H Broadcasting Co. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making and Order to Show Cause* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the permittee of Channel 297A at Clarendon, Arkansas, as follows: B and H Broadcasting Co., 4004 Clay Drive, Jonesboro, Arkansas 72401.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **March 11, 1991,** and reply comments on or before **March 26, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Capps Radio Company
Attn: John Paul Capps
P.O. Box 1488
Searcy, Arkansas 72143

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on

behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's suggested site for Channel 296C3 at Bald Knob are 35-10-00 and 91-44-54.

[2] At the time this proposal was filed, B & H Broadcasting Co. ("B&H") was the sole applicant for Channel 297A at Clarendon (File No. BPH-891002MN). However, its application for a construction permit was subsequently granted. Coordinates at the site specified in the construction permit issued to B&H at Clarendon are 34-37-19 and 91-22-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TELEPHONE AND DATA SYSTEMS, INC. File No. 10209-CL-P-715-B-88

For a construction permit to establish a new cellular system to operate on Frequency Block B in the Domestic Public Cellular Telecommunications Radio Service to serve the Wisconsin - 8 (Vernon) Rural Service Area-Market Number 715-B

ORDER ON RECONSIDERATION

Adopted: December 31, 1990; Released: January 15, 1991

By the Deputy Chief, Common Carrier Bureau:

1. Century Cellunet, Inc. ("Century"), Contel Cellular, Inc., Coon Valley Farmers Telephone Company, Inc., Hillsboro Telephone Company, LaValle Telephone Cooperative, Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative and Viroqua Telephone Company ("Century Group")[1] filed a petition seeking reconsideration of a Memorandum Opinion and Order ("*Order*") released by the Mobile Services Division (MSD), which granted the application of Telephone and Data Systems, Inc. ("TDS") for authority to construct a wireline Block B cellular facility in the Vernon RSA.[2] For the reasons set forth below, we deny the petition for reconsideration and affirm the MSD *Order*.

I. BACKGROUND

2. On June 9, 1989, TDS was named tentative selectee for the wireline Block B construction authorization for the Vernon RSA. [3] Century, a mutually exclusive applicant, filed a petition to deny. In its petition, Century alleged that TDS held prohibited ownership interests in more than one application in the Vernon RSA. Century pointed out that ten of the thirteen wireline carriers ("wireline applicants") who filed applications for the Vernon RSA, including Century itself, and four additional wireline carriers with a presence in the Vernon RSA who did not file applications for the Vernon RSA ("carriers") entered into a post-filing, pre-lottery, partial settlement agreement.[4] The partial settlement agreement provided that if one of the applications of these ten wireline applicants won the lottery, a partnership made up of the signatories to the partial settlement agreement ("Wisconsin RSA 8 Partnership") would be substituted as the applicant for the Vernon RSA. While TDS was not a party to the partial settlement agreement, one of the four carriers that did not file an application for the Vernon market but was a party to the settlement agreement was UTELCO, Inc. (UTELCO), a company in which TDS owns 49% of the stock. Thus, Century argued, TDS had a prohibited ownership interest in more than one application for the same RSA. The MSD *Order* denied Century's petition. Subsequently, Century Group filed a petition for reconsideration of the *Order*, TDS submitted an opposition to the petition and Century Group filed a reply.

II. CONTENTIONS OF THE PARTIES

3. In its petition for reconsideration, Century Group reiterates the argument that Century made in its petition to deny, namely that TDS, because of its 49% ownership of UTELCO, had a prohibited ownership interest in more than one application for the Vernon RSA in violation of Section 22.921(b)(1) of the Commission's Rules, and that TDS failed to disclose the existence of the prohibited ownership interest as required by Section 1.65 of the Rules. Additionally, Century Group argues that, pursuant to Section 22.33(b)(2) of the Rules, TDS, through its ownership interest in UTELCO, was a member of a joint enterprise entitled to cumulative lottery chances in the Vernon RSA. Based on this joint enterprise theory, Century Group reiterates that TDS had an ownership interest in more than one application in the Vernon RSA and that TDS' application should be dismissed and a new lottery conducted.

4. In opposition, TDS contends that settlement agreements do not create any form of ownership interest which is cognizable under Section 22.921(b)(1) and thus, TDS, through UTELCO, acquired no interest in the application of Wisconsin RSA 8 Partnership, since the settlement agreement was never implemented. Additionally, TDS argues that since it was not subject to the settlement agreement, it was not obligated to report it to the Commission in its application. TDS notes that Section 22.33(b)(2) states explicitly that cumulative lottery chances will be awarded to partial settlement enterprises among wireline applicants. TDS avers that Section 22.33(b)(2) does not apply to TDS, because it was not a signatory to the partial settlement agreement and does not apply to UTELCO because it was not an applicant.

III. DISCUSSION

5. Century Group requests that we find TDS in violation of Section 22.921(b)(1) and dismiss TDS's application in the Vernon RSA because UTELCO joined a partial settlement group in the same market that TDS was already a wireline applicant. With regard to the viability of the partial settlement, the Commission has consistently stated that it favors settlement agreements among wireline applicants. *See* Section 22.29 of the Rules, and *Clarification of Requirements for Pre-filing Settlement Agreements by Wireline Applicants in Rural Service Area Cellular Markets*, 64 Rad. Reg. (P&F) 1637, 1638 (1988) (*Requirements*). Specifically, in the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission concluded that the prohibition against partial settlements for non-wireline applicants should not apply to wireline applicants. Similarly, Section 22.33(b)(2) of the Rules provides that a partial settlement among mutually exclusive cellular wireline applicants for RSAs, if entered into after the filing of individual applica-

tions by its members, will receive the cumulative number of lottery chances that the individual applicants would have had if no partial settlement had been reached.

6. Section 22.921(b)(1) states in pertinent part:

> No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

TDS held a 49% interest in UTLECO, one of the parties to the partial settlement agreement. There is no doubt that, absent the fact that TDS had an application on file for the Vernon market, the partial settlement agreement was permissible under the Commission's Rules. *See Bloomington-Normal MSA Limited Partnership*, 3 FCC Rcd 3743 (Mob. Serv. Div. 1988).

7. Had TDS held a greater than 1% interest in any of the Century Group applicants at the time the applications were filed, all applications in which TDS had an interest would have been dismissed as violative of Section 22.921(b) because Section 22.921(b) prohibits wireline carriers from having greater than 1% ownership interests in more than one application in the same market. However, UTELC0 was not an applicant in the Vernon RSA. Nonetheless, a violation of Section 22.921(b) occurred when UTELCO entered into the partial settlement agreement. Notwithstanding this violation, we decline to dismiss TDS's application because it would be inequitable to do so for three reasons. First, at the time it filed its application, TDS was in compliance with the Commission's Rules. After filing, Century Group formed a partial settlement group which included wireline carriers, such as UTELCO, who had not originally filed applications in the Vernon market. Century Group knew of TDS's ownership interest in UTELCO and, despite this knowledge, permitted UTELCO to join the settlement group. In these circumstances, it appears to be UTELCO's and Century Group's actions which led to the violation of Section 22.921(b) of the Rules and not TDS's actions.[5] Short of withdrawing its own application, TDS could do nothing more than object to UTELCO's entry into the partial settlement group.

8. Second, even if Century Group's theory were correct, a more appropriate sanction than dismissing only TDS's application would be to dismiss all Century Group applications and TDS's application since all of the these applications suffered from the rule violation.[6] This action would be inequitable to TDS because it was not within TDS's control to prohibit UTELCO from joining the settlement group.

9. Third, the cross-ownership rule is intended to prevent applicants from unfairly skewing the lottery by receiving cumulative chances to win a lottery. As such, the rule is intended to protect other applicants from being unfairly prejudiced in the lottery. Here, all the partial-settlment applicants had the power to veto UTELCO's participation in the settlement agreement. Whatever prejudice existed was wholly within their control and they failed to protect their own interests.[7] In these circumstances, we do not believe that dismissing TDS's application would be an appropriate sanction.

10. Similarly, we find that TDS has not violated Section 1.65 of the Rules. Petitioners' allegations regarding TDS' duty to disclose in its application the details of the partial settlement agreement are based on a misapplication of the obligations contained in *Requirements* 64 Rad. Reg. (P & F) at 1638. Section 1.65 obligates TDS, as an applicant, to maintain the continuing accuracy and completeness of its pending application. *Requirements* indicates that applicants should disclose the details of settlement agreements involving the applicant. TDS is not the controlling party in UTELCO which entered into the settlement agreement, and UTELCO was not an applicant in the Vernon RSA market. Particularly because the settlement agreement did not become effective when TDS won the lottery, TDS had no obligation to inform the Commission of the settlement.[8]

11. After carefully reviewing the facts and circumstances in the record before us, we affirm the grant of the application of Telephone and Data Systems, Inc.[9]

IV. CONCLUSION AND ORDERING PARAGRAPH

12. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Century Cellunet, Inc., *et. al.* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] The Century Group consists of wireline carriers who are losing applicants in the Wisconsin-8 (Vernon) Rural Service Area Market Number 715-B (Vernon RSA) wireline lottery or who are non-applicant wireline carriers with a presence in the Vernon RSA.

[2] *Memorandum Opinion and Order*, 4 FCC Rcd 8021 (Mob. Serv. Div. 1989).

[3] Public Notice, Report No. CL-89-174 (June 9, 1989).

[4] Twelve wireline applicants entered the lottery for Market No. 715 Wisconsin - Vernon. Of these twelve applicants, TDS, GTE Mobilnet Incorporated (GTE) and Ameritech Mobile Communications, Inc. (Ameritech) did not enter into the partial settlement agreement. GTE and Ameritech did not file petitions against TDS.

[5] Century Group alleges that TDS somehow tricked it by withdrawing from the settlement at the last moment. TDS denies this allegation. Century Group could have written the settlement agreement to exclude UTELCO if TDS did not sign, but it failed to do so. TDS was under no legal obligation to protect Century Group's interest in the settlement.

[6] Under the circumstances, other equitable sanctions for violation of Section 22.921(b) would be to punish the settling applicants for permitting UTLECO to join the settlement or to punish UTELCO directly for entering into the partial settlement agreement.

[7] GTE and Ameritech were the only applicants other than TDS which could have been prejudiced by any technical violation of Section 22.921(b), and neither GTE nor Ameritech challenged TDS's application.

[8] Notwithstanding, the Commission did become aware of the partial settlement agreement, including UTELCO's involvement, through letters submitted prior to the lottery.

[9] To the extent that the MSD *Order* suggests that any contingent interest in a cellular application does not amount to an ownership interest within the meaning of Section 22.921(b)(1), the *Order* is overruled.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

CENTRAPAGE OF VERMONT, INC. File No. 21766-CD-MP/L-90

For authority to construct and operate a new facility in the Public Mobile Service on frequency 152.60 MHz for Station KNKL401 at Goffstown, New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 15, 1991

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 6, 1989, Centrapage of Vermont, Inc. ("Centrapage") was granted a Radio Station Authorization to construct a base station facility on frequency 152.60 MHz for Station KNKL401 at Goffstown, New Hampshire ("Goffstown facility"). On January 3, 1990, three days before the date of required completion, Centrapage filed a Request for Extension of Time ("Form 489 Notification") to complete construction of the Goffstown facility. By letter dated February 1, 1990, the Mobile Services Division ("MSD") denied Centrapage's request for extension of time and terminated the authorization for the Goffstown facility. On March 2, 1990, Centrapage filed a Petition for Reconsideration of the MSD decision. For the reasons set forth below, we deny Centrapage's Petition for Reconsideration.

II. CONTENTIONS

2. In its Petition for Reconsideration, Centrapage argues that the MSD erred in its decision to deny the request for extension of time and terminate the authorization because the MSD based its decision on three inaccuracies. First, Centrapage asserts that, in its February 1, 1990 letter, the MSD did not acknowledge the fact that in July of 1989, Centrapage had applied for a control station ("control link") for use with the base station facility at Goffstown, but did not receive authorization for this control link until November 8, 1989, just two months before the expiration of its construction permit for the Goffstown facility. Second, Centrapage argues that its Form 489 Notification, which it filed on January 3, 1990, contained an inconsistency between the answer to question 6(a), which indicated that equipment had not been delivered, and Exhibit E1, which indicated that equipment had been delivered. Centrapage avers that equipment had, in fact, been delivered and that it was ready to construct the facility. Third, Centrapage contends that by the time the application for a control station was granted in November of 1989, unexpectedly severe winter weather conditions in Goffstown precluded it from completing construction within the authorized time period.

III. DISCUSSION

3. Section 22.43, the controlling Commission Rule in this case, provides, in pertinent part, that:

> (a)(2) [T]he station must be completed and ready for operation, as shown by commencement of service within 12 months after the grant of the radio station authorization . . .
>
> (3) If construction is not completed within the time period set forth in this rule the authorization will automatically expire. Before the period for construction expires an application for an extension of time to complete construction (FCC Form 489) may be filed . . .
>
> (b)(1) . . . Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control. No extensions will be granted for lack of financing, site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.

4. Initially, we note that Centrapage did not complete construction of the Goffstown facility and commence service within 12 months after the grant of its radio station authorization. Instead, on January 3, 1990, Centrapage filed a Form 489 Notification requesting additional time to construct. It explained that installation had not progressed due to (1) Centrapage's decision to wait for a control station permit and (2) severe winter weather in December of 1989. Additionally, we note that when Centrapage filed its original application for the Goffstown base station it did not at the same time file an application for a control station authorization. On July 12, 1989, 6 months after receiving its construction authorization for the Goffstown facility, Centrapage applied for a control station permit which was granted on November 8, 1989, two months before the Form 489 Notification was filed. What is more, Centrapages's Form 489 Notification did not specify how long an extension of time was required to bring the authorization into compliance with the Commission's Rules.

5. In its letter of February 1, 1990, denying the request for extension of time and terminating Centrapage's authorization, the MSD found that, in light of Centrapage's decision to wait for the grant of a control channel authorization, Centrapage's allegations of severe winter weather did not justify an extension of time. The MSD stated that the original Goffstown authorization had been granted on January 6, 1989, and that Centrapage had ample time to construct its Goffstown facilities during the spring, summer or fall of 1989 without encountering the problems inherent in severe winter weather conditions. It is clear from the facts presented in this case that the only reason that winter weather became a problem for Centrapage was because it waited for the control station permit.

6. Section 22.43(b)(1) of the Rules states that extensions of time to complete construction will only be granted if the authorization holder is unable to construct due to causes beyond its control. Centrapage's decisions to (1) wait until July 1989 to apply for a control facility and (2) wait for the grant of that application are both within its control. Centrapage could have constructed the Goffstown facility within the 12 month time period. In order to avoid the risk of constructing the Goffstown facility with a control authorization application pending, Centrapage should have requested all needed facilities at one time, rather than six months apart. In these circumstances, the MSD's decision to deny the open-ended extension request was correct.

7. Moreover, while it is true that the MSD did not acknowledge in its February 1, 1990 letter, that Centrapage's application for a control link was filed on July 12, 1989 and not granted until November 8, 1989, this omission has no bearing on the result of this case. Centrapage's decision to apply for the control link was wholly within its control, and does not justify an extension of time pursuant to Section 22.43(b)(1) for the base station facilities whose authorization was granted on January 6, 1989. Similarly, Centrapage's contention that its Form 489 Notification contained an inconsistency between the answer to question 6(a), indicating that equipment had not been delivered and Exhibit E1, which indicated that equipment had been delivered, is also without decisional significance. The MSD decision was not based on the presumption of due diligence in ordering equipment incorporated in Section 22.43 (b)(1) of the Rules, but rather on Centrapage's failure to demonstrate that it did not complete construction of its Goffstown facilities due to causes beyond its control. Because we find that Centrapage has offered no justification for a grant of an extension of time to complete construction, we need not consider whether Centrapage did or did not timely order equipment. Therefore, in light of the circumstances in this case, we deny Centrapage's Petition for Reconsideration.

IV. ORDERING PARAGRAPH

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Centrapage of Vermont, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 61.58(a)(2)
of the Commission's Rules and
Regulations

ORDER

Adopted: December 26, 1990; Released: January 7, 1991

By the Commission:

1. By the Federal Communications Commission Authorization Act of 1990, Public Law 101-396 (FCCAA), the United States Congress, *inter alia*, amended Section 203 of the Communications Act, 47 U.S.C. § 203, to extend the maximum notice period for tariff filings from 90 to 120 days.[1] The current Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, establishes notice periods for various types of tariff filings. Section 61.58(a)(2) delegates to the Chief, Common Carrier Bureau, authority to defer the effective date of any tariff filing to a maximum of 90 days.[2]

2. In order to allow the Chief, Common Carrier Bureau, to continue to exercise the full statutory authority granted this Commission to defer the effective date of tariff filings, Section 61.58 is hereby amended to conform to the amended Section 203 of the Communications Act.[3]

3. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 4(j), 203(b)(1), and 203(b)(2) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 203(b)(1), 203(b)(2), and Section 1.412(b)(5) of the Commission's Rules, 47 C.F.R. § 1.412(b)(5), Section 61.58(a)(2) of the Commission's Rules, 47 C.F.R. § 61.58(a)(2), IS AMENDED as set forth in the Appendix to this Order. Pursuant to 5 U.S.C. § 553(d)(3), and in order expeditiously to implement the clear congressional mandate, this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the Code of Federal Regulations, Part 61, is amended as follows:

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply Sec 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.58 is amended by revising paragraph (a)(2) to read as follows:

§ 61.58

(a) * * *

(2) The Chief, Common Carrier Bureau, may require the deferral of the effective date of any tariff filing made on less than 120 days' notice, so as to provide for a maximum total of 120 days' notice, or of such other maximum period of notice permitted by Section 203(b) of the Communications Act, regardless of whether petitions under § 1.773 of the Commission's Rules have been filed.

* * * * *

FOOTNOTES

[1] Section 7 of the FCCAA amends Section 203(b)(1) and (2) of the Communications Act "by striking out 'ninety days' and inserting in lieu thereof 'one hundred and twenty days.'"

[2] Section 61.58(a)(2) reads as follows:

> [t]he Chief, Common Carrier Bureau may require the deferral of the effective date of any tariff filing made on less than 90 days' notice, so as to provide for a maximum total of 90 days' notice, regardless of whether petitions under § 1.773 of the Commission's rules have been filed.

[3] Notice and public comment are not required to effect this change. *See* Section 1.412(b)(5) of the Commission's Rules, 47 C.F.R. § 1.412(b)(5). *See also* 5 U.S.C. § 553(b)(A).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 10, 1991

MEETING OF THE SYSTEMS SUBCOMMITTEE OF THE FCC ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE

The 12th meeting of the Systems Subcommittee of the Advisory Committee on Advanced Television Service will be held at 10:00 a.m. on February 21, 1991, in Room 856 at the FCC's offices at 1919 M Street, N.W., Washington, D.C.

The agenda for the meeting is:

1. Introductory Remarks
2. Approval of Agenda
3. Approval of Minutes from November 6, 1990 Meeting
4. Status of Open Action Items from the Previous Meeting
5. Report on Mr. Wiley's Meeting with the System Proponents
6. Discussion of 4th Interim Report
7. Report on Subjective Test Materials
8. Report by Working Party 1 (Systems Analysis)
9. Report by Working Party 2 (System Evaluation and Testing)
   - A. Report on Field Test Procedures Plans
   - B. Report from the Laboratories
10. Report by Working Party 3 (Economic Assessment)
11. Report by Working Party 4 (System Standard)
12. Open Discussion
13. Next Meeting

All interested parties are invited to attend. Those interested may also submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Committee Chairman.

Any questions regarding this meeting should be addressed to Dr. Irwin Dorros at (201) 740-3200 or Alan Stillwell at (202) 632-7060.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-608

In re Applications of

ROUND ROCK VENTURES (hereafter "RRV")	File No. BPH-880712MM
ROUND ROCK RADIO GROUP, INC. (hereafter "RRRGI")	File No. BPH-880713MG
ELINOR LEWIS STEPHENS (hereafter "Stephens")	File No. BPH-880714ML
AUGUST COMMUNICATIONS GROUP, INC. (hereafter "August")	File No. BPH-880714MN
CATHERINE DIAL EASLEY (hereafter "Easley")	File No. BPH-880714MR
ROCA REDONDO RADIO, INC. (hereafter "Roca")	File No. BPH-880714MT
VANTAGE BROADCASTING, A GENERAL PARTNERSHIP (hereafter "Vantage")	File No. BPH-880714MV
TRI-R FM (hereafter "Tri-R")	File No. BPH-880714MX
ROUND ROCK BROADCASTING, INC. (hereafter "RRBI")	File No. BPH-880714MZ
GRASS ROOTS RADIO, INC. (hereafter " GRRI")	File No. BPH-880714NJ
LYNN E. GERSTEIN (hereafter "Gerstein")	File No. BPH-880714NN
JIMMY L. RAY (hereafter "Ray")	File No. BPH-880714NU
RADIO ROUND ROCK LIMITED PARTNERSHIP (hereafter "Radio Round")	File No. BPH-880714MH (Dismissed Herein)

For Construction Permit for a
New FM Station on Channel 290C2 (105.9 MHz)
in Round Rock, Texas

and

TOM S. WHITEHEAD, INC. (hereafter "Whitehead")	File No. BPH-880527IB (Dismissed Herein)

For Modification of Facilities
For Station KWHI-FM
Brenham, Texas

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 16, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* By *Report and Order* in MM Docket No. 86-442, 3 FCC Rcd 2495 (1988) the Commission amended the Table of FM allotments to modify the license of Whitehead's Station KWHI-FM, Brenham, Texas to specify operation as a Class C2 facility on Channel 291. In that same *Report and Order* the Commission also added to the Table of FM Allotments Channel 290C2 at Round Rock, Texas. The *Report and Order* fixed the effective date of each allotment as June 13, 1988, gave Whitehead up to 90 days from the effective date to tender its resultant minor change application, and opened a filing window from June 14 to July 14, 1988 for the Round Rock allocation. In addition, in order for the proposed Round Rock and Brenham facilities to co-exist, the Commission stated that Channel 290C2 at Round Rock required a site restriction of 17.9 km (11.1 miles) west of the community.

3. On May 27, 1988, Whitehead filed an application to upgrade KWHI's facilities. GGRI, on July 15, 1988, filed a "petition to dismiss or deny and petition for reconsideration of acceptance" of Whitehead's application.[1] GGRI argues that Whitehead's application should be dismissed because it proposes a site that is 5.3 km short of the required 130 km for protection of the Commission's allotment at Round Rock. On December 16, 1988, Whitehead filed a "petition for reconsideration" of the acceptance for tender of the applications filed by the following Round Rock applicants; RRV, Radio Round, August |formerly Barger|, Easley, Roca, Vantage, RRBI, GRRI and Ray. Whitehead alleges that these applications propose antenna locations short-spaced to its pending facilities modification proposal in varying distances from 0.1 to 4.0 km.[2]

4. An engineering review of Whitehead's application reveals that the application was inadvertently accepted for tender. First, the application was filed before the effective

date of the *Report and Order*. At the time of filing, no allocation existed for Channel 291C2 in Brenham, Texas. The allocation change did not officially occur until June 13, 1988, the effective date of the *Report and Order*. Pursuant to 47 C.F.R. § 73.203, applications may only be filed for allocations presently entered in the FM Table of Allotments (47 C.F.R. § 73.202(b)). This section further notes that no applications will be accepted for tender where an allocation has not been made, notwithstanding any petition for Rule Making that may be filed at that time. Accordingly, the application will be returned as inadvertently accepted for tender.

5. Furthermore, even had the application been tenderable, it would have been dismissed as unacceptable for filing for reasons which follow. [3] As of the close of the amendment of right period the application was in violation of 47 C.F.R. § 73.207 in that it was short spaced by 5.3 kilometers to the reference coordinates for the first adjacent Class C2 allocation in Round Rock, Texas. The proposed spacing is 124.7 km while the required spacing is 130 km. Whitehead apparently disregarded the site restrictions placed on both allotments to allow them to co-exist within the confines of the Commission's minimum distance separation requirements.

6. Whitehead recognized the short spacing and requested a waiver of § 73.207(a). However, the request does not contain a sufficient showing to justify a waiver of § 73.207(a).[4] When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. *Rio Grande Family Radio Fellowship, Inc.* v. *FCC*, 406 F2d 644 (D.C. Cir. 1968). We have afforded Whitehead's waiver request the "hard look" called for under the *WAIT* Doctrine, *WAIT Radio* v. *FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in Whitehead's justification are insufficient to establish that grant of the requested waiver would be in the public interest.

7. Additionally, an applicant proposing to relocate its transmitter to a short-spaced site must make a three-part threshold showing to justify a waiver of the spacing rules. The application must show: (i) that the present site is no longer suitable, *John Lamar Hill*, 70 FCC 2d 153 (Rev. Bd. 1978); (ii) that alternative, non-short-spaced sites are unavailable, *Carrol-Harrison Broadcasting, Inc.*, 62 FCC 2d 45, 46, (1976) and *Townsend Broadcasting Corp.*, 62 FCC 2d 511, 512, (1976); and (iii) that the proposed site is the least short spaced of all suitable sites, *Megamedia*, 67 FCC 2d 1527, 1528 (1978). After meeting the aforementioned tests, the applicant must still show that waiver of the spacing requirements would serve the public interest. Moreover, when seeking a waiver of this magnitude of our minimum spacing requirements, an applicant must produce concrete support, preferably documentary, that non-short-spaced and lessor short-spaced sites are unavailable. Such a showing typically consists of affidavits from real estate agents attesting to the lack of suitable land. Whitehead's application, as of the close of the amendment of right period, failed to provide any documentation to support its claim that suitable spaced sites were unavailable.[5] Therefore, Whitehead's request for waiver must be denied.

8. By amendment filed November 23, 1988, Whitehead provided additional information to supplement its original request for waiver of § 73.207(a). Furthermore, by amendment filed April 18, 1989, Whitehead provided supplemental information concerning its efforts to locate a suitable transmitter site near the reference point specified in the Commission's *Report and Order*. However, in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19193 (1985), *recon. denied*, 50 Fed. Reg. 43157 (1985), the Commission adopted strict rules governing acceptance of amendments for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the *Public Notice* announcing that the application has been accepted for tender. 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Notwithstanding an applicant's arguments that "good cause" for accepting an amendment exists, the Commission's commercial FM processing rules are quite clear that applicants may not perfect their applications by filing a curative amendment to correct an acceptability or grantability defect after the time for filing amendments as of right has passed. Whitehead's application was put on *Public Notice* for acceptance for filing and simultaneously for acceptance for tender on June 20, 1988. Whitehead, therefore, had until July 21, 1988 to file amendments as a matter of right. Therefore, Whitehead's November 23, 1988 and April 18, 1989 amendments were untimely filed and accordingly, even if tenderable, Whitehead's application remained unacceptable for filing.[6]

9. Accordingly, based on the foregoing, Whitehead's petition for reconsideration dated December 16, 1988, will be denied and the petition to dismiss or deny and petition for reconsideration of acceptance filed by GGRI will be dismissed as moot.

10. *Radio Round*. An engineering review of Radio Round's application reveals the proposed operation exceeds the maximum facilities allowed under the United States-Mexican Agreement, 24 U.S.T. 1815, T.I.A.S. No. 7697. This agreement limits Class C2 facilities within 320 km of the Mexican border to 50 kw effective radiated power (ERP) and 150 meters antenna height above average terrain (HAAT). For applicants whose HAAT exceeds 150 meters, the ERP power must be appropriately derated in accordance with Annex IV of the agreement. Radio Round proposes a HAAT of 298 meters, which would limit the ERP to 9.3 kw. Radio Round's application proposes an ERP of 11.5 kw. The limitations set forth in the agreement were not considered in Radio Round's application. *See, e.g., Kerrville Radio, A Limited Partnership*, 2 FCC Rcd 3441 (1987); *Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989). Accordingly, Radio Round's application will be dismissed as inadvertently accepted for filing.

11. *RRBI*. Information before the Commission indicates that RRBI was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question RRBI's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against RRBI in this proceeding.

12. RRBI's proposal indicates that it is in the process of forming a corporation which will become the applicant. RRBI has not amended its application to indicate that such a corporation has been formed. Accordingly, RRBI will be required to submit an amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, indicating whether the corporation represented as the applicant for its instant proposal has indeed been formed.

13. *RRV*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although RRV has filed such statement, it is deficient. RRV has not listed specific sources of recruitment specializing in minority candidates. Accordingly, RRV will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

14. *Roca*. Roca proposes to mount its antenna on an existing tower structure. However, the tower data submitted in Section V-G of FCC Form 301 in Roca's application is inconsistent with that contained in the Commission's records. Roca lists the overall height above ground level (AGL) as 259 meters and the overall height above mean sea level (AMSL) as 564. Commission records indicate heights of 161.2 meters AGL and 472 meters AMSL for the existing tower. Because Roca is clearly proposing to mounts its antenna on an existing tower structure that is contained in the Commission's records, this discrepancy is neither a tenderability nor an acceptability defect and may be corrected by an amendment. Accordingly, Roca must either file an amendment with the presiding Adminstrative Law Judge within 30 days of the release of this Order correcting the heights listed in its application, or submit documentation to establish that the heights specified are, in fact, correct and the Commission's records are in error. In addition, because of the discrepancies in the heights an FAA issue will be specified.

15. *Tri-R*. Tri-R's application, as amended on April 5, 1990, indicated that it was applying for a Class C facility instead of a Class C2 as authorized by the Commission in the instant proceeding. However, because the ERP and HAAT parameters specified in Tri-R's amendment are for Class C2 facilities per 47 C.F.R. § 73.211, we can confidently and reliably determine that Tri-R is applying for a C2 facility. Accordingly, Tri-R will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order correcting this discrepancy.

16. On January 19, 1990, October 24, 1989, April 5, 1990 and January 3, 1990, August, Vantage, Tri-R, and Ray, respectively, petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

17. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
Stephens	December 15, 1989
August	October 23, 1989
Vantage	August 24, 1989
GRRI	January 9, 1989, May 31, 1989
	December 11, 1989 (engineering)
Gernstein	October 18, 1990
Ray	March 23, 1989, February 7, 1990

18. The Federal Aviation Administration has determined that the antenna proposed by RRV, RRRGI, Stephens, August, Roca, Vantage, Tri-R, RRBI, GRRI, Gerstein and Ray would constitute a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

19. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Easley have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Easley would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

20. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the propos-

als. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

21. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

22. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of RRBI.

2. To determine whether RRBI's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether RRBI possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by the RRV, RRRGI, Stephens, August, Easley, Roca, Vantage, Tri-R, RRBI, GRRI, Gerstein and Ray would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

23. IT IS FURTHER ORDERED, That Whitehead's application for a modification of facilities (BPH-880527IB) IS DISMISSED as inadvertently accepted for tender.

24. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Whitehead on December 16, 1988 against RRV, Radio Round, August [formerly Barger], Easley, Roca, Vantage, RRBI, GRRI and Ray IS DENIED and the petition to dismiss or deny and petition for reconsideration of acceptance filed by GGRI on July 15, 1988 against Whitehead IS DISMISSED AS MOOT.

25. IT IS FURTHER ORDERED, That Whitehead's September 22, 1989 amendment stylized a "request to separately process application" is untimely and IS DISMISSED.

26. IT IS FURTHER ORDERED, That the application of Radio Round IS DISMISSED as inadvertently accepted for filing.

27. IT IS FURTHER ORDERED, That RRBI shall submit an amendment in accordance with paragraph 12 hereinabove to the presiding Adminstrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That within 30 days of the release of this order, RRV shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

29. IT IS FURTHER ORDERED, That Roca shall submit an amendment in accordance with paragraph 14 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That Tri-R shall submit an amendment in accordance with paragraph 15 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Stephens, August, Vantage, Tri-R, GRRI, Gerstein and Ray ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

32. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

33. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

34. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

35. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Procedurally, a petition to deny does not lie against a minor change application. *See* 47 U.S.C. § 309(d)(1). Accordingly, GGRI's petition will be considered as an informal objection.

[2] Section 1.45 sets out the pleading cycle for responsive pleadings and authorizes the filing of oppositions against petitions to deny and the filing of replies against oppositions. As to pleadings outside that cycle, 47 C.F.R. § 1.45(c) states that "[a]dditional pleadings may be filed only if specifically requested or authorized by the Commission." The Commission made no such request and gave no such authorization in the instant case. Therefore, the pleadings filed outside of the cycle were not considered.

[3] We note that the application, although inadvertently accepted for tender, was nevertheless placed on a notice for tender and acceptance on June 20, 1988. Accordingly, Whitehead had until July 21, 1988 to submit curative amendments correcting any acceptability defects. *See* the discussion in paragraph 8 below.

[4] In support of the requested waiver Whitehead stated: "No suitable site could be found within the very small area imposed by the new allocation of Channel 290C2 at Round Rock, Texas. All of the land in the area is owned by large ranching interests, none of whom would make available a plat of land suitable for construction of the proposed facilities."

[5] It is noted that Whitehead's original application did not contain an explanation as to the unavailability of land in the area of the coordinates it proposed to the Commission in its petition for Rule Making. Furthermore, Whitehead did not explain why it was not able to find an available site at or near the coordinates specified for Brenham in the *Report and Order* in Docket 86-442, *supra*, - coordinates of a site that comply with the site restrictions imposed by the Commission.

[6] Whitehead's September 22, 1989 amendment, stylized a "request to separately process application" is also untimely and will be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-305

In re Applications of

AUDREY R. MORRIS	File No. BPH-880630ME
MGR LIMITED PARTNERSHIP	File No. BPH-880630NO
CAROLINA COMMUNICATIONS V LIMITED PARTNERSHIP	File No. BPH-880630NU

For Construction Permit for
New FM Station, Channel 262A,
Pawley's Island, South Carolina

ORDER

Adopted: January 7, 1991; Released: January 17, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. On November 21, 1990, the Review Board by *Order*, 5 FCC Rcd 6966, deferred action on an Appeal filed by Audrey R. Morris, at her request, pending resolution of a proposed settlement agreement. By *Memorandum Opinion and Order*, FCC 90M-3894, released December 10, 1990, Administrative Law Judge Miller approved that settlement agreement and terminated the proceeding.

2. ACCORDINGLY, IT IS ORDERED, That the Appeal from Presiding Judge's Interlocutory Order Concerning Privileged Documents filed September 26, and corrected September 28, 1990, by Audrey R. Morris IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CALIFORNIA BROADCASTING CORPORATION Ventura, California	**BC DOCKET NO. 80-698** File No. BPCT-790130LP
CHANNEL ISLANDS TELEVISION CORPORATION Ventura, California	**BC DOCKET NO. 80-699** File No. BPCT-790103LQ

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 16, 1991

By the Commission:

1. This proceeding involves mutually exclusive applications for a new television station in Ventura, California filed by Channel Islands Television Corporation (CITC) and California Broadcasting Corporation (CBC). The Review Board affirmed the ALJ's initial decision, 98 FCC 2d 1003 (1984), disqualifying CITC on character and financial issues, and the supplemental initial decision, FCC 86D-28 (Apr. 9, 1986), also disqualifying CBC. *California Broadcasting Corp.*, 2 FCC Rcd 4175 (1987). The Board found that neither applicant was qualified to be a Commission licensee, and refused to approve a settlement agreement between them.

2. Having examined the pleadings before us,[1] we agree with the Board that CITC and CBC are basically unqualified to be Commission licensees. With regard to the financial issues, the Board is correct that neither applicant was ever financially qualified. 2 FCC Rcd at 4195 n.3. Despite certifying in their applications that all statements contained therein were "true, complete, and correct to the best of [their] knowledge and belief, and [were] made in good faith," both applicants supplied false financial information in their applications. These deficiencies in the original applications provide ample basis for their denial. We further find that approval of the proposed settlement agreement between CBC and CITC will not serve the public interest. Accordingly, we will deny the applicants' Applications for Review.

3. CITC is currently comprised of its majority stockholder, Ralph Andrews, and 17 minority stockholders. The proposed settlement agreement provides for the dismissal of CBC's application, the withdrawal of majority stockholder Ralph Andrews from CITC, the transfer of Andrews' stock to four of CITC's other stockholders, and the grant of a construction permit to an entity comprised of CITC's 17 remaining stockholders. After grant of a construction permit to CITC, CITC will go into partnership with an unrelated third party, Roger McKinnon, to form Ventura Broadcasting Partnership (VBP). VBP will then acquire CITC's construction permit and build the proposed station. Initially, VBP will be 85 percent owned by CITC and 15 percent owned by McKinnon. However, McKinnon has options to acquire an additional 34 percent of VBP within two years. After the station has been operating for three years, McKinnon may, subject to CITC's right of first refusal, acquire another 26 percent of VBP.

4. The agreement recites that CITC principal Ralph Andrews and CBC principal Harry Keiffer, allegedly responsible for the disqualifying conduct of CITC and CBC respectively, will receive substantially less than they expended in prosecuting their respective applications. There is no comparable representation as to whether CITC's 17 other stockholders stand to realize a profit as a result of their agreement with MacKinnon, either initially or upon the future exercise by MacKinnon of his various options to increase his interest in the permittee.

5. For the reasons provided below, we agree with the Board that the withdrawal of CITC's 50.1% stockholder, Ralph Andrews, who is also chairman and chief executive officer of CITC, at this stage of the proceeding does not render it fully qualified to be a Commission licensee. In other words, CITC cannot escape the consequences of Andrews' wrongdoing by securing his withdrawal from the applicant, particularly at this late stage of the proceeding. Thus, we will deny the proposed settlement without regard to the proposed role of non-party McKinnon and we need not reach the question of whether the participation of a third party would also warrant denial of this settlement.[2]

6. In rejecting the settlement agreement between CITC and CBC, the Review Board relied on *Kannapolis Television Co.*, 1 FCC Rcd 1037 (1986). There we rejected a settlement agreement that contemplated the grant of a construction permit to an unqualified applicant because "[i]t is well established that construction permits may be awarded only to fully qualified applicants." 1 FCC Rcd at 1039. However, after the Board's decision in this case, we granted reconsideration and approved the proposed settlement in *Kannapolis*. 3 FCC Rcd 2676 (1988). Nevertheless, for the reasons set forth below, we believe that *Kannapolis* is distinguishable, and that approval of the settlement agreement between CBC and CITC would disserve the public interest.

7. In *Kannapolis* the Review Board assessed a decisive character demerit against Commmunity Action Communications, Inc. because of the misconduct of its principal, Rev. D. Garland Faw, and denied its application on comparative grounds. *Focus Television Co.*, 98 FCC 2d 546 (Rev. Bd. 1984). Before the Commission acted on pending applications for review and a settlement agreement in *Kannapolis*, it adopted its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), which expressly applies to pending adjudicatory proceedings. *Id.* at 1235 ¶ 121.

8. The *Character Policy Statement* eliminated character as a *comparative* factor in licensing proceedings such as that case. *Id.* at 1232 ¶ 113. In view of this change in Commission policy, the Commission reevaluated the misconduct of Faw, who was Chairman of the Board of Community, proposed general manager, and a voting member of Community's owner, Truth Temple. *Kannapolis Television Co.*, 1 FCC Rcd 1037, 1038-39 ¶¶

12-15 (1986). It determined that Community was basically unqualified, and rejected the settlement agreement because it provided for the grant of Community's application. 1 FCC Rcd at 1039 ¶¶ 16-18.

9. On reconsideration, the Commission accepted an amendment reporting Faw's resignation and complete withdrawal from Community, approved the settlement agreement, and granted Community's amended application. *Kannapolis Television Co.*, 3 FCC Rcd 2676 (1988). The Commission found that Community had acted diligently in securing Faw's departure from Community, and that the amendment reporting his resignation as an officer and director of Community was therefore supported by good cause, as 47 C.F.R. § 73.3522(b) requires. In concluding that Community's amendment was supported by good cause, the Commission noted that the Board assessed only a comparative demerit against Community under a character issue concerning Faw's misconduct, and that the Commission did not conclude that Faw's conduct was basically disqualifying until after Community submitted its original settlement agreement. Thus, the Commission reasoned that Community may have concluded that the elimination of character as a *comparative* factor in the *Character Policy Statement* removed any stigma from Faw's misconduct. Under these circumstances, the Commission refused to penalize Community for not severing its connection with Faw in the original settlement agreement. *Id.* at 2676-77 ¶ 7.

10. In other words, rather than following the wait-and-see approach taken by the applicants in this case, Community diligently secured Faw's withdrawal before the end of the thirty day period for seeking reconsideration of the order disapproving the settlement. In contrast, there is no comparable basis for concluding that CITC acted diligently in securing the removal of its majority stockholder, Ralph Andrews. The ALJ disqualified CITC on March 21, 1984 based on Andrews' misconduct. Yet, CITC waited more than three years before reporting in its May 21, 1987 Petition for Leave to Amend filed with the Review Board that Andrews had resigned as president, treasurer, and director of CITC. Given this more than three year delay in entering into the settlement, the amendment reporting Andrews' withdrawal from CITC is not supported by good cause, as section 73.3522(b) requires for post-designation amendments. Under these circumstances, we conclude that Andrews' departure from CITC does not provide a basis for finding it qualified to be a Commission licensee, and we will not approve the settlement agreement.

11. From a public interest standpoint, CITC's clear lack of due diligence offsets its claim that approval of the settlement agreement would potentially expedite the start of new broadcast service to the community of Ventura. As the Court of Appeals has explained, the Commission has not adopted "a *per se* rule excusing the want of diligence whenever the defect to be cured by amendment is disqualifying." *Royce International Broadcasting Co. v. FCC*, 820 F.2d 1332, 1337-38 (D.C. Cir. 1987). In fact, we are concerned that, given CITC's lack of diligence, permitting CITC to remove Andrews at this stage of the proceeding would delay the resolution of future adjudicatory proceedings. By disapproving this agreement on this basis, we encourage applicants in other proceedings to evaluate their postures, with respect to the standard comparative issue and any basic qualifying issues, and to address any problems promptly.

12. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the Application for Review, filed September 11, 1987, by California Broadcasting Corporation, and the Application for Review, filed September 11, 1987, by Channel Island Television Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before the Commission are: (a) an Application for Review, filed September 11, 1987, by CBC; and (b) an Application for Review, filed September 11, 1987, by CITC.

[2] *See Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990), recon. denied, 5 FCC Rcd 2913 (1990), appeal pending sub nom. *Rowland Gulf, Inc. v. FCC*, No. 90-1308 (D.C. Cir. June 11, 1990), where the Commission denied a proposed settlement because of the participation of a third party.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CAGAL CELLULAR COMMUNICATIONS CORPORATION — File No. 12573-CL-P-123-A-86

For a construction permit to establish a cellular system operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service in the Santa Rosa-Petaluma, California Metropolitan Statistical Area.

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1990; Released: January 16, 1991

By the Commission:

1. R. Grant Singleton ("Singleton") has filed an Application for Review of the action taken by the Mobile Services Division ("MSD") granting the captioned application of Cagal Cellular Communications Corporation ("Cagal") and denying the petition to deny filed by Singleton. *Cagal Cellular Communications Corporation*, 2 FCC Rcd 4270 (1987) ("*MSD Order*"). Cagal has filed an Opposition to Singleton's Application for Review.[1]

I. BACKGROUND

2. Cagal filed an application for the Santa Rosa-Petaluma, California Metropolitan Statistical Area on February 3, 1986. It won the lottery[2] and its application was placed on public notice listing it as the non-wireline tentative selectee. [3] Competing applicants Singleton (who was the second-ranked applicant), Roam-Tel Communications ("Roam-Tel"), and United States Cellular Corporation ("U.S. Cellular") filed petitions to deny contending that Cagal's application contained numerous technical defects. On August 6, 1986, Cagal filed a consolidated reply to the three petitions. Subsequently, on March 16, 1987, Cagal filed a Memorandum in Support of Corrective Amendment and Clarification of Record (collectively, "corrective amendment") regarding its application. The corrective amendment contained: (a) the equipment supplier's original equipment and construction cost estimates, (b) Cagal's June 18, 1986 balance sheet and a current balance sheet, and (c) corrected coordinate and elevation data for each of Cagal's cell sites, with corresponding adjustments to antenna designs, tower height, and effective radiated power ("ERP").[4] Singleton filed a response to Cagal's corrective amendment contending that Cagal's application was so blatantly defective that it could not be cured by corrective amendment. In its order, the MSD rejected Singleton's arguments, as well as the other petitions to deny, found Cagal's application as amended to be consistent with the Commission's Rules, and granted Cagal's application. Thereafter, Singleton filed his Application for Review.[5]

II. CONTENTIONS

A. Singleton's arguments

3. In his Application for Review, Singleton first asserts that the MSD erred by refusing to return Cagal's application as unacceptable for filing, pursuant to Section 22.26(b) of the Commission's Rules.[6] In support, Singleton argues that the engineering parts of Cagal's application were completely deficient when filed and, thus, Cagal's application was a skeleton application containing little more than its correct Cellular Geographic Service Area ("CGSA") boundary. Singleton argues that the errors in engineering data in Cagal's original application were of the kind that require application dismissal under precedent established in *Sainte Broadcasting Corporation*, 60 R.R. 2d (P&F) 1377 (1986) ("*Sainte*"). Singleton also argues that *Offshore Telephone Co.*, 2 FCC Rcd 4575 (Mob. Serv. Div. 1987) ("*Offshore*"), *application for review denied*, 3 FCC Rcd 4601 (1988), stands for the proposition that the Commission can reinvestigate its finding of acceptability where it later finds upon review that an application is defective and should be dismissed.

4. Singleton then argues that the *MSD Order*'s determination that Cagal's application was not deficient relies on erroneous findings of fact. Singleton states that two findings in the *MSD Order* -- that the engineering configuration of Cell A contained no defect, and that Cagal properly recomputed its coordinates for all cell sites based on data contained in Cagal's original submission -- are unsupported in the record. According to Singleton, Cagal admitted in its corrective amendment that the Cell A engineering in the original application filed was based on faulty location and elevation information and required the computation of new coverage data.[7] Moreover, Singleton asserts, there is nothing in the original application from which the correct coordinates and elevations of the sites could be determined by either Cagal or the Bureau. Singleton argues that Cagal conceded in its corrective amendment that the engineering exhibits in the original application were based on incorrect coordinates.[8]

5. Next, Singleton asserts, no explanation was given in the *MSD Order* for: the denial of Singleton's request for a hearing, the conclusion that Cell A's engineering was not defective, the failure to address the application's acceptability for filing, and the departure from precedent by permitting a major post-processing engineering amendment to cure defects in the application. Thus, Singleton states, the *MSD Order* violated Section 309(d)(2) of the Communications Act, 47 U.S.C. Sec. 309(d)(2), because the *MSD Order* did not "issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."

6. Singleton also argues that the MSD erred by allowing Cagal to file a major amendment after the cut-off period and after the application had been reached by the staff for processing on May 19, 1986 (*i.e.*, the date the Commission announced Cagal as the non-wireline tentative selectee). According to Singleton, under *Moore's Service*,[9] the corrective amendment Cagal filed ten months after the application was reached for processing was a major amendment and, therefore, could not cure serious defects

that were present when Cagal initially filed its application. Singleton argues that Cagal's corrective amendment changed virtually every aspect of a seriously defective engineering showing and, thus, cannot be deemed a minor amendment.

7. Finally, Singleton contends that an evidentiary hearing is required because Cagal's corrective amendment raised numerous substantial and material issues of fact concerning the application. Singleton identifies the following as substantial questions of fact which require resolution in a hearing:

> (1) the facts and circumstances by which Cagal determined cell-site coordinates and elevations in its original application and certified those descriptions as correct;
>
> (2) whether Cagal took proper steps to verify the accuracy of the information contained in its application;
>
> (3) whether Cagal's reaffirmation of the correctness of virtually all of its engineering data contained in its consolidated reply pleading and corrective amendment constitutes a lack of candor with the Commission or demonstrates Cagal's ineptness to operate a cellular system in fulfillment of the responsibilities of a Commission licensee;
>
> (4) whether the site locations specified in Cagal's application, consolidated reply pleading, or the corrective amendment were actually intended as describing the same sites;
>
> (5) whether Cagal had reasonable assurance of site availability at the time of filing or at any later time or had falsely certified that it had such assurance;
>
> (6) whether Cagal's endorsement of its engineering consultant's qualifications in its consolidated reply is contradicted by the implicit admission in the corrective amendment that its consultant's engineering determinations were incorrect;
>
> (7) the facts and circumstances surrounding Cagal's false certification to the Commission that its system would cover 75% of its CGSA with 39 dBu contours, as originally proposed;
>
> (8) whether the deficiencies in Cagal's application as originally filed render Cagal technically unqualified to be a licensee;
>
> (9) the facts and circumstances concerning the filing of Cagal's admittedly incorrect financial amendment;
>
> (10) whether, in light of the careless preparation of this application, Cagal's cavalier response to the petitions to deny, and the fact that its application was prepared by a mass-marketer of cellular applications, Cagal sincerely intended to construct and operate a cellular system when it filed its application.

Singleton cites *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985), for the proposition that when the Commission is faced with allegations involving substantial and material questions of fact, it must make a determination as to whether a hearing is warranted. Singleton argues that the *MSD Order* is devoid of any such determination.

8. Singleton subsequently filed a Supplement to his Application for Review, claiming that he recently discovered new evidence that Cagal never had a reasonable assurance of the availability of one of its four cell sites. Singleton claims that Marion L. Davis, the owner of the land on which Cagal proposes to erect a tower for its cell site D, has never had any contact or conversations with either Cagal or any agent of Cagal concerning the use of her land. Singleton appended Mrs. Davis' July 24, 1988 declaration stating that there is no lease between herself and Mr. Dale Westerterp ("Westerterp") (who is a partner of DBD Associates, which is the tenant on Mrs. Davis' land) to use the land as a cellular antenna site location. Consequently, Singleton contends that the site-availability letter included in Cagal's application and signed by Westerterp representing that the tower site would be available upon the execution of a lease is untrue. Singleton has also appended the July 24, 1988 declaration of Col. Davis, Mrs. Davis' husband, supporting her declaration. Singleton, in his supplement, requests a hearing to resolve this site-availability issue.

B. Cagal's arguments

9. Cagal responds that its corrective amendment was properly accepted because it was a minor amendment pursuant to Section 22.918 of the Rules [10] and that the changes made in the corrective amendment are of the type routinely accepted by the Commission. Cagal contends that the corrective amendment merely conformed coordinates, elevations, and antennas for each cell to the sites submitted with the original application and described in the original site letters. In reply to Singleton's Supplement, Cagal submits a copy of a lease dated January 27, 1984, between Col. and Mrs. Davis, and DBD Associates which states that DBD Associates is authorized to "sublease space for radio equipment for purpose of communications service." Cagal asserts that after Singleton filed its Supplement, Cagal's Vice President, Dr. Lawrence Rosenthal ("Rosenthal") showed Col. Davis a copy of the lease, and that Col. Davis admitted that DBD Associates did enter into a lease with Col. and Mrs. Davis for the site. Cagal appends Rosenthal's Declaration to this effect and an August 29, 1988 statement, jointly signed by both Col. and Mrs. Davis, conceding that contrary to their previous declarations, they had indeed signed a lease with DBD Associates for the use of their land. Cagal thus concludes that it had a reasonable assurance of the availability of the location for cell site D.[11]

III. DISCUSSION

10. We first must determine whether the engineering/technical errors that Singleton found in Cagal's application render it unacceptable for filing under Section 22.20 of the Rules.[12] Review of applications continues after lottery selection, and post-lottery errors might still be found which render an application defective. We agree with the *MSD Order* that the errors complained of by Singleton do not render Cagal's application defective under Section 22.20. The errors were minor in nature, and the Commission has previously found that such minor engineering errors do not render an application defective and unacceptable for filing so long as "the information contained in the application is generally complete, and the defects at issue did not hinder the processing of the application." *See e.g., Timothy Roper*, 4 FCC Rcd 4070,

4071 (1989).[13] Although Cagal's application contained some errors, there were no material omissions or inconsistencies that, in the absence of the amendment, would have prevented the staff from processing the application. Having found the application acceptable for filing, the next question is the permissibility of the amendment. The amendment was a minor, not major amendment and was, therefore, permissible.[14] Specifically, Cagal's amendment corrected coordinates and site elevations for each cell originally identified in the application.[15]Furthermore, as the *MSD Order* specifically stated:

> [t]he corrected coordinates and elevations for each cell site as well as other changes have been permissibly adjusted to maintain cell coverage as originally intended. Further, the CGSA has not been changed, no 39 dBu contours extend beyond the CGSA or beyond the originally proposed extensions, and the 39 dBu contours still maintain 75% coverage of the CGSA.

MSD Order, 2 FCC Rcd at 4271.[16]

11. Moreover, contrary to Singleton's argument, the rule in *Moore's Service* is not applicable to cellular applications. *See Florida Cellcom*, 2 FCC Rcd 7044 (Com. Car. Bur. 1987). Section 22.918, not *Moore's Service*, governs cellular amendments and specifically permits tentative selectees, such as Cagal, to file minor amendments after the lottery.[17]

12. With respect to Singleton's argument that a hearing must be held to resolve substantial questions of fact concerning the errors in Cagal's application, parties challenging an application and who seek a hearing must satisfy a two-prong test established in 47 U.S.C. Sec. 309(d)(1) and (2). *See Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) ("*Astroline*"). The protesting party must present "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Sec. 309(d)(1). The Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d at 397. If the Commission determines that the petitioning party satisfies the threshold standard, the inquiry proceeds to a second phase. Having found that such party has alleged a *prima facie* case that grant of the application would be inconsistent with the public interest, the Commission determines whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented." 47 U.S.C. Sec. 309(d)(2). *See also Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). In summary, if the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(e).

13. In light of the foregoing, and as discussed in detail below, we disagree with Singleton that the MSD should have granted Singleton's request for an evidentiary hearing.[18]

14. Issues (1), (2), and (6) in paragraph 7, *supra*, and the minor engineering errors referred to therein, do not present a *prima facie* case that Cagal engaged in misrepresentation or lack of candor or is otherwise unqualified to be a licensee. No facts have been presented to suggest any intent to deceive the Commission or such gross carelessness as to render Cagal unqualified. With reference to site availability (issues (4) and (5) in paragraph 7, *supra)*, with the exception of Cell site D, which we discuss in paragraph 16, *infra*, no facts at all have been alleged to support the argument that Cagal failed to obtain reasonable assurance of site availability, and, thus, Singleton has not met prong 1 of the *Astroline* test.[19] Similarly, there has been no *prima facie* case that Cagal intentionally deceived the Commission in connection with its site-availability certification. Singleton's allegation (issue (7) in paragraph 7, *supra)* that Cagal falsely certified in its original application that its system would cover 75% of its CGSA with 39 dBu contours fails to raise a substantial and material question of fact. As the *MSD Order* correctly found, Cagal's original application proposed a system whose 39 dBu contours maintained 75% coverage of the CGSA. 2 FCC Rcd at 4271. In the first part of issue (3), Singleton argues that a hearing is required on whether Cagal's reaffirmation in its consolidated reply pleading of the correctness of its original engineering data raises issues regarding Cagal's lack of candor. Cagal explained in its corrective amendment that subsequent to the filing of its consolidated reply pleading, it retained new legal counsel and a new consulting engineer to independently review its application. As a result of this review, Cagal states, minor inconsistencies in the application were found and it was therefore determined that a corrective amendment should be filed. In light of this explanation, and in view of the fact that we have already concluded that the errors in Cagal's application as originally filed were in fact minor, we find no substantial and material question of fact regarding lack of candor. Singleton, in the second part of issue (3) and in issue (8), argues that Cagal is unqualified technically to be a Commission licensee because of its "ineptness" in submitting its original engineering proposal. As noted above, the minor errors in Cagal's application do not raise a *prima facie* case that it is so careless as to be unqualified to be a licensee. Nor do they make a *prima facie* case that it lacks the requisite technical qualifications.

15. Moreover, Issue (9) in paragraph 7, *supra*, regarding Cagal's incorrect financial amendment does not present a *prima facie* case that the application cannot be granted. Cagal conceded in its corrective amendment that, in its application as originally filed, it had mistakenly submitted construction and equipment costs for its proposed cellular system from an equipment vendor who was not in fact chosen by Cagal. In its corrective amendment, Cagal submitted construction and equipment costs from the correct vendor, which were considerably higher. However, as the *MSD Order* correctly found, Cagal's financial commitment letter contained sufficient funds to cover even the higher costs. In these circumstances, we find that Cagal met the Commission's financial showing requirement in Section 22.917 of the Rules and that its error was minor. In issue (10), Singleton alleges that Cagal's careless preparation of its application, its allegedly cavalier response to the petition to deny, and the fact that it used a mass-marketer of cellular applications to prepare its application, demonstrate that Cagal never intended to construct its cellular system. Even if we accept all of these facts as true, Single-

ton has not presented a *prima facie* case that Cagal's application should not be granted. None of these allegations, if true, logically lead to the conclusion that Cagal was not a sincere applicant. Therefore, no hearing is required on this issue.

16. We also conclude that no hearing is required regarding the allegations raised by Singleton in his Supplement. Singleton established a *prima facie* case for a hearing by alleging specific allegations of fact which, if true, could result in the denial of Cagal's application, namely, that Cagal did not have reasonable assurance of one cell site. Notwithstanding, we conclude, based on the evidence of record, that Singleton has not satisfied the second prong of the *Astroline* test with respect to the site-availability issue. Specifically, we find that Cagal's Reply to the Supplement demonstrates that Cagal had a reasonable assurance of cell site D. The jointly signed August 29, 1988 statement of Col. and Mrs. Davis appended to Cagal's Reply specifically states that Col. and Mrs. Davis "suddenly realized that we had signed a lease with DBD [Associates] in 1984." Their joint declaration goes on to say that Col. and Mrs. Davis "received a copy [of the lease] only recently." They acknowledge that "we are now fully aware of the 1984 lease between DBD Associates and [Col. and Mrs. Davis]." There is no dispute that their jointly signed declaration was signed approximately one month after Col. and Mrs. Davis signed their individual declarations that were appended to Singleton's Supplement declaring that they had not leased the site to Cagal. We thus find that the contents of the August 1988 joint declaration of Col. and Mrs. Davis effectively repudiate their individual July 1988 declarations, and no evidence has been presented to the contrary. Accordingly, we conclude that, contrary to Singleton's argument, the record demonstrates that DBD Associates had the authority to sublease the cell site location for Cell D to Cagal, and that, consequently, Cagal did have a reasonable assurance that the site was available, as required by the rules. In summary, we conclude that, with reference to the ten hearing issues proposed by Singleton, either no *prima facie* case has been raised or no substantial and material question of fact has been presented, and therefore, no hearing is required.

17. For the foregoing reasons, we conclude that Cagal's application was acceptable as originally filed, that its corrective amendment contained permissible minor amendments to its application, that Cagal had reasonable assurance of site availability at the time it originally filed its application, and that a hearing was not required to resolve Singleton's allegations. Therefore, we find that the Bureau properly granted Cagal's application, affirm the *MSD Order*, and deny Singleton's Application for Review.

IV. ORDERING PARAGRAPH

18. Accordingly, IT IS ORDERED that the Application for Review filed by R. Grant Singleton IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Additionally, Singleton has filed a motion for Leave to File Reply to Opposition to Application for Review ("Motion") and a Reply. Cagal in turn filed an Opposition to Motion for Leave to File Reply, a Motion for Leave to File Response to Reply, and a Response to Reply. Singleton also filed a Motion for Waiver of Section 1.115(d) of the Commission's rules, requesting permission to file a supplement to his Application for Review, and a Supplement to his Application for Review. Cagal thereafter filed an Opposition to Motion for Waiver and Reply to Supplement. We need not address Singleton's first Motion because Singleton's filing of a reply is authorized. *See* Ronald F. Trinchitella, 4 FCC Rcd 6360, 6362 n. 4 (1989). Moreover, in the interests of having a complete record for our consideration, we will consider all of the additional pleadings that have been submitted.

[2] *See* Public Notice, Mimeo No. 4024 (released April 23, 1986), which announced the results of the lottery.

[3] *See* Public Notice, Report No. CL-86-161 (released May 19, 1986).

[4] Cell A was amended to specify a higher tower and antenna placement, higher ERP, and a directional antenna. Cell B was amended in minor respects. Cell C was amended to lower ERP and top-mount the antenna on a shorter tower. Cell D was amended to specify lower ERP, utilize a different antenna, and top-mount the antenna on a shorter tower. The coordinates of all four cell sites were also slightly modified.

[5] Neither Roam-Tel nor U.S. Cellular has filed an application for review of the *MSD Order*. Cagal constructed its system and received a license to operate the system on January 11, 1989.

[6] Section 22.26(b) provides in pertinent part:

> Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness. Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules.

[7] Singleton states that Cagal's amendment shows that the latitude specified in the application, *i.e.*, 38° 40' 55"N., was incorrect and that the correct latitude was 38° 41' 18"N., and that the correct elevation was 560 feet, not 900 feet.

[8] Singleton states that Cagal contacted the site owners, determined where transmitters could be located, based on 7 1/2 minute maps that were not included in the original application, and supplied the new coordinates from the new site survey.

[9] Allen C. Moore d/b/a Moore's Service, 86 FCC 2d 787 (Com. Car. Bur. 1981).

[10] Section 22.918 relates to amendment of cellular applications. *See* note 14, *infra*.

[11] Cagal contends that Singleton's accusations are moot because Cagal determined prior to the filing of Singleton's Supplement that Cell site D should be relocated at a higher elevation and, thus, has obtained an option to lease a new location for cell site D. This contention is irrelevant to our determination of whether the applicant had a reasonable assurance of site availability at the time it originally filed its application, as required by the rules.

[12] Section 22.20(a) states in pertinent part that an application will be unacceptable for filing and returned to the applicant if:

> (1) The application is defective with respect to completeness of answers to questions, informational showings, execution or other matters of formal character, or

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements.

[13] It is far from clear that cases in the Low Power Television (LPTV) service are directly relevant in the cellular context. In any event, to the extent they are relevant, this case is unlike *Sainte* (cited by Singleton) in which there was an inconsistency in the antenna height data in the application that prevented further processing. Moreover, precise coordinate and antenna height data is crucial in the LPTV context which is licensed by sites, and not so important in the cellular context which is licensed on a system-wide basis using the CGSA concept.

[14] Sections 22.23 and 22.918 of our Rules relate to the amendment of appications. In particular, Section 22.23(c) discusses major and minor amendments and states that all amendments are classified as minor except that an amendment shall be deemed a major amendment if the amendment: (1) results in a substantial change in the engineering proposal such as (a) a change in, or addition of a radio frequency or (b) a change in the class of station; (2) enlarge the reliable service area of proposed base station facilities by more than a certain amount; (3) results in an increase in the Cellular Geographic Service Area ("CGSA"); or (4) specifies a substantial change in beneficial ownership or control of an applicant. Cagal's corrective amendment does not contain any changes that fall into any classification deemed a major amendment under Section 22.23(c), and was therefore a minor amendment. Section 22.918(b), which relates to cellular markets 91 and beyond and Rural Service Areas, permits minor amendments but no major amendments except those listed in Section 22.23(g).

[15] We accept Cagal's argument that its re-computation of its site coordinates was based on the site letters which were filed with the original application. (A cellular site letter is a letter that contains the name of the owner of a site and indicates the site's availability for the construction of cellular facilities.) We accept Cagal's statement in its corrective amendment that the original site owners were consulted to determine the corrected coordinates. Although the *MSD Order* erred when it stated that, "there is no defect insofar as the configuration of Cell A is concerned[,]" 2 FCC Rcd at 4271, we conclude that such error is not decisionally significant and, thus, nonprejudicial. The Commission does not return applications for such minor errors in describing a cell-site configuration. *Accord, Jacksonville Cellular Telephone Corporation*, 3 FCC Rcd 5386 (1988). As the *MSD Order* correctly found, the corrected coordinates and their associated elevations contained in the corrective amendment were minor changes. *Id.* In addition, the *MSD Order* correctly noted that other changes were permissibly made. Those changes (such as antenna designs, tower height, and ERP), while not specifically listed by the *MSD Order*, were made to maintain cell coverage as close as possible to the originally intended coverage.

[16] Singleton's reliance on *Offshore* is similarly misplaced. There, the applicant applied for a wireline frequency but was found not to be engaged in the business of providing public landline service and, thus, did not comply with Section 22.902(b)(2) of the Rules (which relates to eligibility for the assignment of frequencies, depending upon the nature of the applicant). Consequently, unlike Cagal's application, the *Offshore* application contained a fundamental defect, *i.e.*, the applicant was ineligible to apply for the frequency block it selected, which rendered the application unacceptable for filing.

[17] As *Florida Cellcom* correctly points out, our rules for cellular applications subject to lottery disposition went into effect several years after *Moore's Service* was decided. *Moore's Service* stands for the proposition that a fatally defective mutually exclusive application that has not been returned and is cured before the application is reached for processing will be retained on file and given comparative consideration. In contrast to the situation in *Moore's Service*, the errors in Cagal's original application were not serious enough to justify dismissing its application pursuant to Section 22.20 of our rules. Because Cagal's application did not contain fatal defects, even the *Moore's Service* case would not have required dismissal of Cagal's application.

[18] Because we are explicitly considering and rejecting Singleton's request for a hearing in this Order, we find the MSD's failure to do so to be non-prejudicial. In addition, it is not necessary to address Singleton's allegation that the MSD failed to discuss the acceptability for filing of Cagal's application because we here rule on the acceptability of Cagal's application under our filing standards.

[19] We note that the corrected coordinates differed only slightly (0.46 mile for cell site A; 0.45 mile for cell site B; 300 feet for cell site C; 0.33 mile for cell site D) from those stated in the application as originally filed. These discrepancies are not so great as to suggest that Cagal did not originally intend to use the cell sites for which it submitted site letters, and Singleton has proffered no evidence to contend otherwise.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rule Making RM 7578
to Modify the Commission's
Regulation of International
Common Carrier Services
Provided by Foreign Owned U.S.
Common Carriers

ORDER EXTENDING COMMENT PERIOD

Adopted: January 4, 1991; Released: January 7, 1991

By the Chief, International Facilities Division:

1. On December 12, 1990, the Commission issued a public notice of a petition for Rule Making in the above-captioned matter filed by Cable & Wireless Communications, Inc. (C&W). Comments on the petition are currently due to be filed by January 14, 1991.

2. On December 28, 1990, British Telecommunications plc (BT) filed a motion requesting an extension of time until January 28, 1991, for the submission of comments in the above-referenced petition for Rule Making. BT requests additional time because the comment period largely coincides with the holidays when key personnel are not available, particularly in the United Kingdom. In addition, BT believes the extension will serve the public interest by permitting a more adequate analysis of the issues raised and a better record upon which the Commission can base a decision. BT states that no parties will be prejudiced by this slight delay. C&W has indicated that it will not oppose the request so long as the Commission finds good cause to grant the extension request.

3. Extensions of time are not routinely granted. *See* 47 C.F.R. Section 1.46(a). The proximity of a filing date to a holiday is generally not a sufficient reason for an extension. In this case, however, we agree with BT that no parties will suffer any prejudice by this delay. We therefore find good cause to grant the requested extension of time.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 1.46(b) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.46(b), that all interested parties will have until **January 28, 1991,** to file comments and until **February 12, 1991,** to file reply comments in the above-captioned matter.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-500

In the matter of

Definition of Congested Areas in
the Broadcast Auxiliary Services and
the Cable Television Relay Service.

ORDER EXTENDING TIME FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: January 3, 1991; Released: January 4, 1991

By the Chief, Mass Media Bureau:

1. On November 14, 1990, the Commission released a *Notice of Proposed Rule Making* ("NPRM") in MM Docket No. 90-500 that proposed a definition of geographical areas that are "subject to frequency congestion."[1] This definition is based on an area being within a Metropolitan Statistical Area (MSA) as determined by the Department of Commerce and will be needed to determine the appropriate antenna performance standards for fixed auxiliary and cable television relay stations. The antenna standards are scheduled to become effective for all stations on October 1, 1991.[2] The deadlines for filing comments and reply comments were, respectively, January 4, 1991 and January 18, 1991.

2. On December 27, 1990, the Society of Broadcast Engineers, Incorporated (SBE), requested an extension of the comment period. SBE indicates that it is conducting a survey of its affiliated frequency coordinating committees to develop a complete recommendation regarding MSAs that should be excluded from the "congested area" requirements and sites that are outside of any MSA that nevertheless should be included as a "congested area." In order to complete the survey, compile the results, and submit them in its comments, SBE requests that the filing deadlines be extended by 45 days.

3. SBE filed the petition for rule making that initiated this proceeding. Their continued participation by filing comprehensive comments on our proposal should provide valuable assistance in our effort to establish an effective definition. Accordingly, while we are reluctant to delay action in this proceeding, we are persuaded that the extension now under consideration should be approved.

4. Accordingly, IT IS ORDERED THAT the request to extend the comment date filed by the Society of Broadcast Engineers, Incorporated IS GRANTED. The date for filing comments in this proceeding IS EXTENDED to February 18, 1991 and the date for filing reply comments IS EXTENDED to March 11, 1991. No further extensions of these dates are contemplated.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

6. Further information may be obtained from Hank VanDeursen, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, MM Docket No. 90-500, Rcd 6687 (1990), 55 Fed. Reg. 48260, published November 20, 1990.

[2] *See* Sections 74.536, 74.641 and 78.105 of the Comission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY,
Complainant,

v. File No. E-90-283

CENTRAL TELEPHONE COMPANY OF ILLINOIS
Defendant.

ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company (hereinafter "Charter") filed with the Commission the above-captioned formal complaint against Central Telephone Company of Illinois (hereinafter "Central") seeking recovery of damages for Central's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Central filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On December 17, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v. File No. E-90-192

CONTEL OF CALIFORNIA, INC.,
Defendant.

ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Com Systems, Inc. (hereinafter "Com Systems") filed with the Commission the above-captioned formal complaint against Contel of California, Inc. (hereinafter "Contel") seeking recovery of damages for Contel's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Contel filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On December 14, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORP.,
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF ILLINOIS and	File No. E-90-338
CENTRAL TELEPHONE COMPANY OF NEVADA,	File No. E-90-339
Defendants.	

ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Litel Telecommunications Corp. (hereinafter "Litel") filed with the Commission formal complaints against Central Telephone Company of Illinois and Central Telephone Company of Nevada (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On December 17, 1990, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON UNITED'S PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On November 30, 1990, United Telephone Company of Indiana and United Telephone Company of Ohio (United) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. United requests that the Commission exempt United from implementing equal access for those offices with ITT 1210 switches. According to United, on March 15, 1988, it received a letter that could be construed as a request for an equal access conversion from MCI Telecommunications Corporation (MCI). Pursuant to Commission order, United is required to complete equal access conversion of stored-program-controlled switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985).

United characterizes MCI's initial letter regarding equal access as vague. United states that on May 26, 1988, it requested that MCI clarify its intent with regard to United's equal access conversion process. United asserts that MCI did not respond to its request until June 26, 1989, at which time MCI stated that it considered March 15, 1988 as the request date for equal access conversion. United states that in October 1989 it met with MCI to discuss the problems associated with equal access conversion. United contends that MCI stated that it considered the three-year conversion period to be flexible as long as United continued to work toward improving its equal access conversion schedules. However, according to United, during an August 1990 meeting, MCI inquired whether United would be meeting its equal access conversion deadline of March 1991. United argues that the three-year time period should expire in August 1993 since MCI did not request equal access until August 1990.

In addition, United claims that the characteristics of its stored-program-controlled switches make it financially infeasible to implement equal access because they require processor as well as software upgrades. United argues that the costs associated with equal access conversion for those offices with ITT 1210 switches outweigh the benefits to the users.

Interested parties should file comments on the petition by **January 22, 1991,** and reply comments by **February 1, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON MONTROSE MUTUAL TELEPHONE COMPANY'S PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On December 14, 1990, Montrose Mutual Telephone Company (Montrose) filed a petition for waiver of the Commission's equal access implementation requirements for independent telephone companies. In March 1988, Montrose received a letter from MCI Telecommunications Corporation (MCI) requesting that Montrose convert its facilities to equal access. Pursuant to Commission order, end offices equipped with electromechanical switches should be converted to equal access as soon as practicable and are not held to a specific timetable, whereas end offices equipped with stored program-controlled switches are required to convert to equal access within three years of a reasonable request. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985).

Montrose states that the three year time period will end in March 1991, and it seeks an additional fifteen months, until June 1, 1992, to complete the equal access conversion. Montrose states that its existing step-by-step switch is not capable of equal access, but it is in the process of taking bids on a digital switch. Montrose states that although it has an aggressive plan to implement equal access, the conversion of its four exchanges to digital technology will consume a substantial amount of time and resources of its personnel. Montrose anticipates that the new digital switch with equal access capability will be installed by June 1992. Montrose states that MCI has agreed to the new completion date.

Interested parties should file comments on this petition by **January 22, 1991,** and reply comments by **February 1, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY CORPORATION — File No. I-T-C-90-172

Application for authority to utilize the Galaxy VI domestic satellite (formerly Westar VI-S) for the provision of one-way transborder services from the United States) to Latin American and Caribbean locations, and one-way and two-way transborder services between the United States and Canada and Mexico.

SATELLITE TRANSPONDER LEASING CORPORATION — File No. I-T-C-90-173

Application for authority to provide one-way transborder services from the United States to Latin America and Caribbean locations, and one-way and two-way transborder services between the United States and Canada and Mexico via the SBS-4, SBS-5 and SBS-6 domestic satellite systems.

CONTEL FEDERAL SYSTEMS CORPORATION — File No. I-T-C-90-182

Application for authority to provide transborder services between the United States and any and all countries via any and all satellite systems that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

AMERICAN SATELLITE COMPANY d/b/a Contel ASC — File No. I-T-C-90-185

Application for authority to provide transborder services between the United States and any and all countries via any and all satellite systems that have been or) will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

GTE SPACENET CORPORATION — File No. I-T-C-91-016

Application for authority to utilize its GSTAR IV satellite for the provision of two-way transborder services between the U.S.) and Canada and Mexico and one-way service from the U.S. to Latin American/Caribbean locations

HUGHES NETWORK SYSTEMS CORPORATION — File No. CSG-90-040-ML

Application for authority to modify its license for a 7.6-meter fixed Ku-band transmit/receive hub earth station (Call Sign E881109) at Germantown, Maryland and 1,000 1.0-meter fixed Ku-band transmit/receive VSAT earth stations (Call Sign E900192) for the provision of one-way transborder services from the United States to Canada, Mexico, and Latin America, and two-way transborder services between the U.S. and Canada and Mexico via all satellites that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

CBS, INC. — File No. CSG-90-068-ML

Application for authority to modify its license for a 6.1-meter fixed Ku-band transmit/receive earth station (Call Sign E880111) at New York, New York for the provision of one-way transborder services between the United States and various countries and two-way transborder services between the U.S. and Canada and Mexico via any and all satellites that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

VASTARR BUSINESS SERVICES, INC. File No. CSG-90-083-(3)-ML

Application for modification of the license for its three 5.5-meter Ku-band antennas (Call Sign E2579) at Chicago, Illinois and network of 1.8-meter (Call Sign E880818) and 2.4-meter (Call Sign E880819) VSAT earth stations for the provision of transborder services between the U.S. and various locations via all satellites consulted under Article XIV(d) of the INTELSAT Agreement and to use antenna #2 of E2579 to communicate with the PAS-1 satellite for services to those countries PAS is authorized to serve

AMERICAN SATELLITE COMPANY d/b/a Contel ASC File No. CSG-90-095-ML

Application for authority to modify the license for its 12.0-meter and 13.0-meter fixed C-band transmit/ receive earth stations (Call Sign E7465) at Ellenwood, Georgia for the provision of transborder services between the United States and various countries via any and all satellites that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement and to communicate with the PAS-1 satellite

CHEVRON INDUSTRIES, INC. File No. CSG-90-102-ML

Application for authority to modify its license for a Ku-band VSAT network consisting of a 6.1-meter hub station (Call Sign E900688) at San Ramon, California and up to 5000 1.0-meter (Call Sign E900691), 1.8-meter (Call Sign E900690) and 2.4-meter (Call Sign E900689) earth stations to provide transborder services between the U.S. and Canada and Mexico

VITACOM SATELLITE SERVICES CORPORATION File No. CSG-90-104-ML

Application for authority to modify the license for its 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890989) at Mountain View, California to add as points of communication all U.S. domestic satellites and the Anik and Morelos satellites for the provision of transborder services

VITACOM SATELLITE SERVICES CORPORATION File No. CSG-90-105-ML

Application for authority to modify the license for its 3.7-meter fixed C-band transmit/receive earth station (Call Sign E900848) at Kennedale, Texas to add as points of communications all U.S. domestic satellites and the Mexican Morelos satellite system for the provision of transborder services between the U.S. and Mexico

PHAR-MOR, INC. File No. CSG-90-107-(3)-ML

Application for authority to modify the license for its Ku-band band VSAT network consisting of a 6.1-meter fixed hub station at Youngstown, Ohio and up to 1,000 1.8-meter and 2.4-meter earth stations to provide transborder services between the U.S. and various locations consulted under Article XIV(d) of the INTELSAT Agreement

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC File No. CSG-90-112-ML

Application for authority to modify the license for its 4.1-meter fixed Ku-band transmit/receive earth station (Call Sign E870520) at Washington, D.C. to provide transborder services between the U.S. and various locations consulted under Article XIV(d) of the INTELSAT Agreement

CONTEL FEDERAL SYSTEMS, INC. File No. CSG-90-114-ML

Application for authority to modify the license for its two 12.0-meter fixed C-band transmit/receive antennas (Call Sign E4373) at Ft. Meade, Maryland to add as points of communication all U.S.

domestic satellites and the Anik and Morelos satellites for the provision of transborder services between the U.S. and various locations consulted under Article XIV(d) of the INTELSAT Agreement

EQUATORIAL COMMUNICATIONS COMPANY — File No. CSG-90-115-ML

Application for authority to modify the license for its 11.0-meter fixed C-band transmit/receive earth station at Mountain View, California to provide transborder data services between the U.S. and various countries consulted under Article XIV(d) of the INTELSAT Agreement

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC — File No. CSG-90-118-ML

Application for authority to modify the license for its 9.0-meter fixed C-band transmit/receive earth station (Call Sign E880472) at Vallejo, California to provide transborder services between the U.S. and various countries via all satellites consulted under Article XIV(d) of the INTELSAT Agreement

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC — File No. CSG-90-128-ML

Application for authority to modify the license for its 8.1-meter fixed C-band transmit/receive earth station (Call Sign E860593) at Staten Island, New York to provide transborder services between the U.S. and various countries via all satellites consulted under Article XIV(d) of the INTELSAT Agreement

TANDEM COMPUTERS INC. — File No. CSG-91-007-ML

Application for authority to modify the license for its 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890346) at Cupertino, California to provide transborder services between the U.S. and various locations via satellites consulted under Article XIV(d) of the INTELSAT Agreement for transborder services

DIGITAL EQUIPMENT CORPORATION — File No. CSG-91-010-ML

Application for authority to modify its license for a 5.6-meter fixed Ku-band transmit/receive earth station (Call Sign E880049) at Bedford, Massachusetts for the provision of transborder services between the United States and Canada and Mexico via all U.S. domestic satellites.

COMPUTER POWER, INC. — File No. CSG-91-012-ML

Application for authority to modify the license for its 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E873409) at Jacksonville, Florida to provide transborder services between the U.S. and Canada and Mexico via satellites consulted under Article XIV(d) of the INTELSAT Agreement

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 18, 1990; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title II and Title III of the Communications Act of 1934, as amended, to establish channels of communications via domestic satellite facilities and modify existing domestic satellite earth station licenses to provide transborder services between the United States and Canada and Mexico, and one-way transborder services from the United States to Caribbean, Latin American and South American locations. The Commission also has under consideration applications requesting modification of existing earth station licenses to add the PAS-1 satellite as a point of communication for services to those countries which the Commission has authorized PAS-1 to serve. The applications were placed on the Commission's public notice. The Communications Satellite Corporation (Comsat) filed comments in response to the applications of American Satellite Company d/b/a Contel ASC and Contel Federal Systems, Inc. (CFS) which request blanket authority to provide two-way services to points other than Canada and Mexico. Contel ASC and CFS filed a joint response to Comsat's comments.

THE APPLICANTS

2. *HUGHES COMMUNICATIONS GALAXY, INC. (Hughes) (File No. I-T-C-90-172).* Hughes requests authority to utilize the Galaxy VI domestic communications satellite (formerly Westar VI-S) for the provision of: one-way service from the United States to Latin American and

Caribbean locations; and one-way and two-way services between the U.S. and Mexico and Canada consistent with consultations completed pursuant to Article XIV(d) of the INTELSAT Agreement. Hughes desires to use Galaxy VI for these services at both the 91^0 W.L. and the 99^0 W.L. locations.[1] Hughes notes that the Galaxy VI satellite has a switchable enhanced Caribbean coverage mode incorporated into six of its transponders. Although the Commission has granted conditional authority for the use of the enhanced coverage feature to provide one-way service to various Central American, Caribbean and South American locations, Hughes notes that the instant application seeks authority to provide one-way service with the enhanced coverage feature in the "off" position. Hughes states that the types of services include video, audio, data and business services.

3. *SATELLITE TRANSPONDER LEASING CORPORATION (STLC) (File No. I-T-C-90-173).* STLC requests authority to utilize the SBS-4, SBS-5 and SBS-6 domestic communications satellites for the provision of: one-way service from the United States to Latin American and Caribbean locations; and one-way and two-way services between the U.S. and Mexico and Canada consistent with consultations completed pursuant to Article XIV(d) of the INTELSAT Agreement. STLC desires to utilize the SBS-4 and SBS-5 satellites for these services at their respective 91^0 W.L. and 123^0 W.L. locations, and to utilize the SBS-6 satellite for these services at both the 72^0 W.L. and 99^0 W.L. orbital locations.

4. *GTE SPACENET CORPORATION (GTE Spacenet) (File No. I-T-C-91-016).* GTE Spacenet requests authority to utilize its GSTAR IV domestic satellite, as well as any replacement satellite for which it may be authorized, to provide two-way transborder services between the U.S. and Canada and Mexico and one-way transborder service from the U.S. to Caribbean and Latin American locations. GTE Spacenet notes that the instant authority is necessary to permit it to supplement its ability to provide transborder services through use of the GSTAR IV satellite in addition to its previously authorized in-orbit multi-satellite system. Although the GSTAR IV satellite has not been consulted under Article XIV(d) of the INTELSAT Agreement, GTE Spacenet requests that such consultation be undertaken as soon as possible.

5. *CONTEL FEDERAL SYSTEMS, INC. (CFS) (File No. I-T-C-90-182).* CFS requests authority to provide any and all transborder satellite telecommunications services that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.[2] CFS also requests authority to serve any country and use any satellite that has been or will be consulted for transborder service under Article XIV(d) using any earth station that the Commission may authorize for the provision of such services. CFS states that grant of the requested authority would subsume and supersede its previous authorizations for transborder service. CFS indicates that it is requesting the more expansive authority in order to avoid having to seek additional authorizations under Section 214 of the Act each time it sells a service that is not covered by the original authorization.

6. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. I-T-C-90-185).* Contel ASC requests authority to provide any and all transborder satellite telecommunications services that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement. [3] Contel ASC also requests authority to serve any country and use any satellite that has been or will be consulted for transborder service under Article XIV(d) using any earth station that the Commission may authorize for the provision of such services. Contel ASC states that grant of the requested authority would subsume and supersede its previous authorizations for transborder service. Contel ASC indicates that it is requesting the more expansive authority in order to avoid having to seek additional authorizations under Section 214 of the Act each time it sells a service that is not covered by the original authorization.

7. *HUGHES NETWORK SYSTEMS, INC. (HNS) (File No. CSG-90-040-ML).* HNS seeks to modify its license for a 7.6-meter fixed Ku-band transmit/receive hub earth station (Call Sign E881109, File No. 796-DSE-MP/L-90) at Germantown, Maryland and an additional 1,000 1.0-meter fixed Ku-band transmit/receive Very Small Aperture Terminal (VSAT) earth stations (Call Sign E900192, File No. 797-DSE-P/L-90) for the provision of transborder services. These additional facilities will expand HNS's current VSAT network which consists of 1,000 1.2-meter, 1.8-meter, and 2.4-meter fixed Ku-band transmit/receive earth stations located at various points. HNS seeks authority to operate these additional earth stations from the primary hub facility, a remote control point in Germantown, Maryland, for the provision of one-way and two-way transborder services between the United States and Canada and Mexico, and one-way transborder services from the United States to points in Latin America via all satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. HNS will be providing extra high-speed data, video and digitized voice transmissions to various points in the above-mentioned countries. HNS certifies that the level of radio frequency radiation in and around the earth stations will never exceed the safety limitations set forth by the American National Standards Institute (ANSI), except in the region between the feed and the reflector. To ensure compliance with the ANSI limit, the earth stations will be turned off whenever maintenance and repair personnel are required to work near this potentially hazardous area. There are no technical modifications to the subject earth stations.

8. *CBS, INC. (CBS) (File No. CSG-90-068-ML).* CBS seeks to modify its license for a 6.1-meter fixed Ku-band transmit/receive earth station (Call Sign E880111, File No. 1188-DSE-MP/L-90) at New York, New York to add one analog video transmit/receive channel to provide one-way transborder services from the United States to various countries, and to add two-way transborder services between the U.S. and Canada and Mexico via all U.S. domestic satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. CBS states that the instant modification will enable it to distribute and receive video programming in combination with existing communications services in support of CBS News' international and domestic operations. CBS certifies that the earth station will continue to comply with safety requirements for radio frequency radiation in and around the facility and that the earth station has no significant adverse environmental impact. there are no technical modifications to the subject earth station.

9. *VASTARR BUSINESS SERVICES, INC. (Vastarr) (File No. CSG-90-083-(3)-ML.* Vastarr requests authority to modify the licenses for its three 5.5-meter hub Ku-band earth stations (Call Sign E2579, File No. 1421-DSE-MP/L-90) and its network of 1.8-meter (Call Sign

E880818, File No. 1422 DSE-MP/L-90) and 2.4-meter (Call Sign E880819, File No. 1420-DSE-MP/L-90) VSAT earth stations to communicate with U.S. domestic satellites as well as the Anik and Morelos satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement for the provision of transborder services to various locations on a private, non-common carrier basis. Vastarr also requests authority to use antenna 2, the southernmost of its three 5.5-meter Ku-band antennas, to transmit and receive communications via the PAS-1 satellite on a private, non-common carrier basis. All tehcnical modifications shall be in accordance with Vastarr's subject application.

10. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. CSG-90-095-ML).* Contel ASC seeks to modify its license for a 13-meter C-band transmit/receive earth station (Call Sign E7465, File No. 1570-DSE-MP/L-90) at Ellenwood, Georgia to add PAS-1 as a point of communication and to provide transborder services between the United States and various countries via all U.S. domestic satellites as well as the Anik and Morelos satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC certifies that the channels Contel ASC has established on PanAmSat using this station have not been nor will be connected with the public switched network. In addition, Contel ASC requests authority to provide transponder testing on PAS-1 using all types of analog and digital signals as well as telemetry, tracking and control (TT&C) for PAS-1 on the frequency band 6420-6425 MHz. At this time, Contel ASC plans to take its 12-meter antenna, Call Sign KA-214, that is currently authorized to provide TT&C services to PanAmSat off of PAS-1 once the 13-meter antenna is placed into service. The 12-meter antenna will then be used to provide service via the ASC-2 satellite once it is launched in April, 1991. Since plans change frequently and the coordination work for this site is complete, Contel ASC would like to retain its PanAmSat authority for the 12-meter antenna. The technical modifications of the subject 13-meter antenna shall be consistent with ASC's application.

11. *CHEVRON INDUSTRIES INC. (Chevron) (File No. CSG-90-102-(4)-ML).* Chevron seeks authority to modify its licenses for a Ku- band fixed transmit/receive earth station network consisting of a 6.1-meter hub station (Call Sign E900688) at San Ramon, California and up to 4900 1.0-meter (Call Sign E900691), up to 80 1.8-meter (Call Sign E900690), and up to 20 2.4-meter (Call Sign E900689) VSAT earth stations located at various points to provide transborder services between the United States and various countries via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement. In particular, Chevron intends to provide extra high- speed data, one-way video and digitized voice transmissions to Canada and Mexico and certain Latin American points, as well as two-way service between the United States and Canada and Mexico. Chevron states that the Chevron Satellite Network (CSN) will be integrated into its existing private telecommunications system to transmit and receive internally-generated voice and data traffic between various Chevron facilities. According to Chevron, the network will provide less expensive, more reliable and efficient sales credit authorization, and will link its exploration and drilling operations throughout the continental U.S. and U.S. coastal waters. Chevron certifies that the operation of the proposed network will have no adverse environmental impact, and that levels of radio frequency radiation are safe for continuous exposure of operating personnel and the general public. There are no technical modifications to the subject earth station.

12. *VITACOM SATELLITE SERVICES CORPORATION (Vitacom) (File No. CSG-90-104-ML).* Vitacom seeks to modify its license for a 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890989, File No. 2072-DSE-P/L-89) at Mountain View, California to provide transborder services between the United States and various countries via all U.S. domestic satellites, as well as the Anik and Morelos satellite systems, which have been consulted under Article XIV(d) of the INTELSAT Agreement. Vitacom states that the instant modification will improve interconnection of geographically-dispersed network communication services for more efficient corporate communications. There will be no technical modifications to the subject earth station.

13. *VITACOM SATELLITE SERVICES CORPORATION (Vitacom) (File No. CSG-90-105-ML).* Vitacom seeks authority to modify its license for a 3.7-meter fixed C-band transmit/receive earth station (Call Sign E900848) in Kennedale, Texas to provide transborder services between the United States and Mexico via all U.S. domestic satellites and the Morelos satellite system consistent with consultations under Article XIV(d) of the INTELSAT Agreement. Vitacom states that it intends to utilize the instant facility to interconnect geographically-dispersed network communication services for more efficient corporate communications. Vitacom certifies that the earth station will not exceed safe levels of radio frequency radiation in and around the area, nor significantly affect the environment. There are no technical modifications to the subject earth station.

14. *PHAR-MOR, INC. (Phar-Mor) (File No. CSG-90-107-(3)-ML).* Phar-Mor seeks authority to modify its licenses for a Ku-band satellite fixed transmit/receive earth station network consisting of a 6.1-meter fixed hub earth station at Youngstown, Ohio and up to 800 1.8-meter and up to 200 2.4-meter fixed VSAT earth stations located at various points to provide transborder services between the United States and various countries via all satellites consulted under Article XIV(d) of the INTELSAT Agreement for transborder services. In particular, Phar-Mor seeks to provide extra high-speed data, one-way video and digitized voice transmissions to Canada and Mexico and certain Latin American points, as well as two-way service between the U.S. and Canada and Mexico. Phar-Mor states that the proposed Phar-Mor Satellite Network (PSN) will increase customer service and product availability by utilizing high-speed computers to control inventory and to promptly and accurately process customer orders. Phar-Mor certifies that construction and operation of the earth station will have no adverse environmental impact, and that levels of radio frequency radiation will be safe for continuous exposure of operating personnel and the general public. The are no technical modifications to the subject earth station.

15. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (ASC) (File No. CSG-90-112-ML).* Contel ASC requests modification of its license for a 4.1-meter fixed Ku-band transmit/receive earth station (Call Sign E870520, File No. 884-DSE-P/L-87) at Washington D.C. to provide transborder services between the United States and various countries via all U.S. domestic satellites, as well as the Anik and Morelos satellites, that have been or

will be consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC states that the provision of transborder services will better enable it to meet the needs of its customers. Contel ASC certifies that levels of radio frequency radiation in and around the facility are safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to the subject earth station.

16. *CONTEL FEDERAL SYSTEMS, INC. (CFS) (File No. CSG-90-114-ML).* CFS seeks to modify its license for two 12.0-meter fixed C-band transmit/receive antennas (Call Sign E4373, File No. 103-DSE-MP/L-85) at Ft. Meade, Maryland to provide transborder services between the United States and various countries via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement, as well as the Anik and Morelos satellite systems. CFS states that the instant modification will better enable it to meet the needs of its customers. CFS certifies that the levels of radio frequency radiation in and around the earth station are safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to the subject earth station.

17. *EQUATORIAL COMMUNICATIONS COMPANY (ECC) (File No. CSG-90-115-ML).* ECC seeks to modify its license for an 11.0-meter fixed C- band transmit/receive earth station (Call Sign E4625, File No. 1827-DSE-P/L-82) at Mountain View, California to provide transborder data services between the United States and various countries via all U.S. domestic satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. ECC states that the instant modification will enable it to provide needed data services for its customers. ECC certifies that levels of radio frequency radiation in and around the earth station are safe for continuous exposure of operating personnel and the general public. No technical modifications of the earth station are necessary.

18. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. CSG-90-118-ML).* Contel ASC seeks to modify its license for a 9.0-meter fixed C-band transmit/receive earth station (Call Sign E880472, File No. 942-(DSE-P/L-88) at Vallejo, California to provide transborder services between the United States and various countries via all U.S. domestic satellites and Anik and Morelos satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC states that such authorization will enable it to provide additional points of communication for its customers. Contel ASC certifies that it has analyzed the levels of radio frequency radiation in and around the station and found them to be safe for continuous exposure of operating personnel and the general public. There are no technical modifications to the subject earth station.

19. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. CSG-90-128-ML).* Contel ASC seeks modification of its license for an 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E860593, File No. CSG-90-004-ML) at Staten Island, New York to provide transborder services between the United States and various countries via all U.S. domestic satellites, as well as the Anik and Morelos satellites, that have been consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC states that a grant of its application will enable it to provide additional points of communication to its customers and reflect already installed equipment. Contel ASC certifies that the levels of radio frequency radiation in and around the station are safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to the subject earth station.

20. *TANDEM COMPUTERS INC. (Tandem) (File No. CSG-91-007-ML).* Tandem requests authority to modify the license for its 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890346, File No. 750-DSE-MP/L-89) at Cupertino, California for the provision of authorized transborder services via all U.S. domestic satellies between the U.S. and Mexico and from the U.S. to Venezuela. Tandem states that it currently operates the subject earth station as part of a network providing video and voice communications to various manufacturing, maintenance and marketing locations throughout the U.S. In order to improve corporate efficiency, Tandem seeks to add to its network the offices of its subsidiaries and affiliates in Mexico and its business associates located in Mexico and Venezuela. Specifically, Tandem requests authority to provide receive-only T.V. and one-way and two-way video, voice and data services to locations in Mexico and receive-only T.V. services to locations in Venezuela. Tandem also requests authority to provide all transborder services previously consulted under Article XIV(d) of the INTELSAT Agreement for Canada, Mexico, the Caribbean and Latin American countries. There are no technical modifications to the subject earth station.

21. *DIGITAL EQUIPMENT CORPORATION (DEC) (File No. CSG-91-010-ML).* DEC seeks authority to modify its license for a 5.6-meter fixed Ku-band transmit/receive earth station (Call Sign E880049, File Nos. 390-DSE-AL-89 and 97-DSE-P/L-88) at Bedford, Massachusetts to provide transborder services between the United States and Canada and Mexico via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement. DEC states that the instant modification will enable it to serve customers at various points in Canada and Mexico. No technical modifications to the earth station will be necessary.

22. *COMPUTER POWER, INC. (CPI) (File No. CSG-91-012-ML).* CPI seeks to modify its license for an 8.1-meter fixed Ku-band transmit/receive hub earth station (Call Sign E873409, File No. 4454-DSE-P/L-87) at Jacksonville, Florida to provide transborder services between the United States and Canada and Mexico via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement. CPI states that the instant modification will enable it to provide high-speed data and one-way video services to Canada and Mexico, and two-way communications as well, expanding its current private domestic VSAT network to meet important customer requirements. CPI certifies that the levels of radio frequency radiation in and around the station are safe for continuous exposure of operating personnel and the general public. No technical modifications of the station are necessary.

DISCUSSION

23. In 1981, following consultations with the Department of State, the Commission established its Transborder policy which permits the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. Under this policy, domestic satellites may

be used for these services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. The Transborder policy also set forth procedures for final implementation of these services. Pursuant to these procedures, consultations under Article XIV(d) of the INTELSAT Agreement have been completed for transborder services between the United States and Canada, the United States and Mexico, and from the United States to Latin American/Caribbean locations.[4]

24. The subject applications request authority to provide services similar to those previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the extension of existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites and receive-only services from the U.S. to Latin American/Caribbean locations.

25. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's Transborder policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[5] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network.[6]

26. The same considerations also apply to the distribution of video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations with little or no additional cost.[7] The incidental reception of this programming in transborder locations is consistent with the Commission's Transborder policy and existing INTELSAT consultations. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum. With respect to point-to-point communications between the U.S. and Canada and the U.S. and Mexico, the Commission has recognized that these services traditionally have been provided by well-developed terrestrial networks and not by INTELSAT.

27. Comsat filed comments in response to the applications of Contel ASC (File No. I-T-C-90-182) and CFS (File No. I-T-C-90-185) which request blanket authority for, *inter alia*, two-way communications between the U.S. and points other than Canada and Mexico. Comsat views the "blanket" applications to provide transborder satellite telecommunications services, including the provision of two-way data services between the United States and the Caribbean, Latin America and South America, as failing to comply with the minimum legal standards established by the United States Court of Appeals in the *Jamaica Teleport* decision.[8] In particular, Comsat states that the use of domestic satellites for international communications can only be justified under two "exceptional circumstances"; where INTELSAT could not provide the service or could not do so economically or practically. Comsat claims that the subject "blanket" applications make no mention of "exceptional circumstances" that would justify authorization, relying instead on grounds of procedural efficiency unrelated to legal requirements. Further, Comsat argues that the essence of *Jamaica Teleport* regarding "exceptional circumstances" is that each request must be examined separately, and that a case-by-case demonstration of the merits of domestic satellite use must be made. Since it views the Contel ASC and CFS applications as requesting vague authority to unspecified points, Comsat asserts that no demonstration of "exceptional circumstances" has been made. Finally, Comsat notes that the applicants admit that the Commission has not yet authorized two-way transmissions (other than to Canada and Mexico) and that, in any event, there is no need to provide such services at this time. Thus, Comsat requests that the above-mentioned applications be denied.

28. In their reply, ASC and CFS state that the Commission has previously granted blanket licenses for two-way service between the U.S. and Canada and Mexico, and one-way service to the Caribbean, Central and South America. Thus, they assert that the Commission can grant their applications without further deliberations as they apply to two-way transborder service between the U.S. and Canada and Mexico. With respect to the provision of two-way transborder service between the U.S. and points in the Caribbean, Central and South America, Contel ASC and CFS contend that they are merely requesting an extension of existing domestic satellite business networks to transmit data traffic unconnected with the public switched network. The applicants argue that such authorization is clearly in accordance with the *Jamaica Teleport* decision because the Court concluded that the FCC could never find INTELSAT service anything other than "uneconomical and impractical" if the service was already being provided domestically and the transborder application was merely requesting to extend that service to another country without the duplication of facilities or multiple hops that would be necessary for INTELSAT to provide the service. Contel ASC and CFS state that their requests for two-way services to the Caribbean, Central and South America involve the expansion of existing networks to transmit/receive points and do not involve new hubs or network control facilities. They argue that under these circumstances, use of INTELSAT facilities would be clearly uneconomical and impractical. Although the applicants concede that they do not have any contracts to provide this type of service, they indicate that they have received numerous requests from existing and potential customers.

29. We reject Comsat's argument to the extent it suggests that the Commission should not grant "blanket" authority under any circumstances. We have previously dealt with this contention in our *Transborder V* decision. As we noted in that decision, the "exceptional" circumstances language set forth in the Buckley letter does not refer to the number of applications or countries. We also noted in *Transborder V* that if one prong of the Buckley criteria is met with respect to a particular type of service (i.e. receive-only video) the service can be authorized on a blanket basis. The *Jamaica Teleport* decision provides no support for Comsat's resurrection of this argument here. In the *Jamaica Teleport* decision, the Court conducted an exhaustive review of the Commission's Transborder policy

as implemented in several decisions, many involving blanket authorizations. In discussing the Commission's processing of Transborder applications, the Court noted that the "transborder cases are typically consolidated decisions on numerous applications from various companies."[9] It is clear from this statement that the Court did not find fault with the manner in which the Commission processed its applications. It is equally clear from its analysis of the Transborder policy that the Court placed emphasis on the the specific service involved and whether it satisfied the Buckley criteria. For example, the Court recognized that where incidental service is involved "it is hard to imagine that the FCC could ever find INTELSAT service to be anything other than 'uneconomical and impractical.'"[10] Thus, to the extent that one-way, receive-only services are requested on a blanket basis from the U.S. to Latin American/Caribbean and locations, we find that the Buckley criteria is satisfied. Contrary to Comsat's assertion, the Contel ASC and CFS applications do not merely request vague authority to unspecified points. The applications clearly limit the services, countries and satellites to those that have been consulted under Article XIV(d) of the INTELSAT Agreement. (*See* Attachments 1 and 2).

30. Comsat is correct, however, in asserting that there is currently no basis upon which the Commission can authorize two-way services to points other than Canada and Mexico. Although the Commission initially determined in its *Transborder XIII* decision[11] that the conditional grant of two-way services between the U.S. and Latin American/Caribbean locations was consistent with the Transborder policy, the decision was later remanded in light of the *Jamaica Teleport* decision. The Commission subsequently sought further information from applicants for two-way services to determine if their proposals could satisfy the Buckley criteria.[12] The Commission received comments from several applicants and Comsat with respect to the extent to which two-way services could be provided between the U.S. and Latin American/ Caribbean locations consistent with the Buckley criteria. Although the arguments of Contel ASC and CFS are in accord with many of the comments submitted in response to the Commission's inquiry, no decision has been reached on this issue. Until a decision is reached, there is no basis for authorizing two-way services between the U.S. and points other than Canada and Mexico. Accordingly, we will defer action on those portions of the Contel ASC and CFS applications which propose two-way services between the U.S. and Latin American/Caribbean locations.[13]

31. We also note that Hughes and STLC request authority to provide transborder services over satellites consulted under Article XIV(d) of the INTELSAT Agreement from different orbital locations than were consulted. Specifically, Hughes requests authority to use its Galaxy VI satellite at the 99^0 W.L. orbital location in addition to the 91^0 W.L. orbital location consulted under Article XIV(d). Similarly, STLC seeks to operate the SBS-6 satellite at both the 72^0 W.L. orbital location consulted under Article XIV(d) and the 99^0 W.L. orbital location which has not been so consulted. While the operation of these satellites at the additional locations requested may not, in fact, cause technical problems with the INTELSAT system, the determination must be made by INTELSAT. Thus, we defer action on the Hughes and STLC requests to provide transborder services from the orbital locations which were not consulted under Article XIV(d) for the particular satellite involved.

32. Finally, we find that the applications of Contel ASC (File No. CSG-90-095-ML) and Vastarr (File No. CSG-90-083-(3)-ML) which propose to access the PAS separate satellite system, are consistent with the Commission's *Separate Systems* decision.[14] On several occasions the Commission has authorized PAS to operate its facilities for communications between the U.S. and specified countries once it was determined that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been fulfilled.[15] The instant applications seek authority to access the PAS system to provide services to those countries which PAS is authorized to serve subject to the conditions placed on the use of separate satellite systems.

33. Accordingly, IT IS ORDERED that the applications of Hughes (File No. I-T-C-90-172), STLC (File No. I-T-C-90-173), CFS (File Nos. I-T-C-90-182 and CSG-90-114-ML), Contel ASC (File Nos. I-T-C-90-185, CSG-90-095- ML, CSG-90-112-ML, CSG-90-118-ML and CSG-90-128-ML), HNS (File No. CSG- 90-040-ML), CBS (File No. 90-068-ML), Vastarr (File No. CSG-90-083-(3)-ML), Chevron (File No. CSG-90-102-ML), Vitacom (File Nos. CSG-90-104-ML and CSG-90-105-ML), Phar-Mor (File No. CSG-90-107-(3)-ML), ECC (File No. CSG-90-115-ML), Tandem (File No. CSG-91-007-ML), DEC (File No. CSG-91-010-ML) and CPI (File No. CSG-91-012-ML) ARE GRANTED and the applicants are authorized to establish channels of communications and/or modify the licenses for their existing earth station facilities to provide the transborder services requested in their applications.

34. IT FURTHER ORDERED that GTE Spacenet's application File No. I-T-C-91-016 is authorized conditionally, subject to completion of the INTELSAT Article XIV(d) consultation process. Upon completion of such consultation, GTE Spacenet will be authorized to use its GSTAR IV satellite for transborder services without any further action by this Commission.

35. IT IS FURTHER ORDERED that the authorization to Hughes and STLC only include the use of satellites at the specific orbital locations consulted under Article XIV(d) of the INTELSAT Agreement. Upon completion of the requisite INTELSAT consultation for the additional orbital locations, Hughes and STLC will be authorized to use the subject satellites for transborder services without any further action by this Commission.

36. IT IS FURTHER ORDERED that the modification of licenses for U.S.-based VSAT networks to access the Anik and Morelos satellite systems does not permit the use of these systems to provide purely U.S. domestic service.

37. IT IS FURTHER ORDERED that this authorization should not be construed as permitting the provision of common carrier services over facilities used for private communications. Any common carrier use will require the filing of a Section 214 application.

38. IT IS FURTHER ORDERED that the applications of Vastarr (CSG-90-083-(3)-ML) and Contel ASC (File No. CSG-90-095-ML) ARE GRANTED and the existing earth station licenses of Vastarr and Contel ASC ARE HEREBY MODIFIED to add the PAS-1 satellite as a point of

communication for service between the United States and those countries that PAS is now or in the future may be authorized to serve.

39. IT IS FURTHER ORDERED that Vastarr and Contel ASC are restricted in their operation of the subject earth stations communicating with the PAS-1 satellite to the provision of capacity through the sale or long- term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

40. IT IS FURTHER ORDERED that the authorizations of Vastarr and Contel ASC are subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions placed on the operation of separate satellite systems.

41. IT IS FURTHER ORDERED that Vastarr and Contel ASC are restricted to operation of the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP- 11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987), and all conditions placed on the PAS-1 system by the Commission.

42. IT IS FURTHER ORDERED that as further conditions to these authorizations, the relevant earth stations shall comply with the technical parameters in the Commission's orders concerning Domestic services entitled *Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions.*

43. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

44. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

45. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Galaxy VI was launched into its assigned 91^0 W.L. location in October, 1990. In addition, Hughes is authorized to locate Galaxy VI at the 99^0 W.L. location on an interim basis to provide continuous service upon the end-of-life of the Westar IV satellite. After Galaxy VI's interim operation at 99^0 W.L., it will return to either the 91^0 W.L. location, or to another assigned orbital location. Hughes notes that Galaxy VI has already been consulted under Article XIV(d) of the INTELSAT Agreement for transborder services at the 91^0 W.L. location. In addition, Hughes notes that Galaxy VI's amplifiers are lower-powered than the Galaxy IV-R which has already been consulted with INTELSAT. Accordingly, Hughes believes that no additional technical consultation with INTELSAT is necessary to permit the Galaxy VI satellite to provide transborder services from the 99^0 W.L. orbital location. Hughes notes that the footprint of the satellite at both locations will allow service to the countries covered by the instant application.

[2] Included in CFS's proposed services are two-way services between the U.S. and Latin American/Caribbean locations. CFS recognizes that the Commission currently does not authorize two-way communications between the U.S. and Latin American/Caribbean locations. Although CFS states that it does not need the service at this time, it requests that any such authorization in the future take into account the instant request.

[3] Contel ASC concedes that the Commission currently does not authorize two-way communications between the U.S. and Caribbean locations. Although Contel ASC states that it does not need the service at this time, it requests that any such authorization in the future take into account the instant request.

[4] *See* Attachments 1 and 2.

[5] Satellite Business Systems, 88 FCC 2d 195 (1981).

[6] We note that many of the applications proposing to extend VSAT networks also seek to provide service "between" the U.S. and Latin American/Caribbean locations. Any service provided via these networks to Latin American/Caribbean locations is limited to the provision of one-way, receive- only audio, video and data services consistent with existing consultations under Article XIV(d) of the INTELSAT Agreement.

[7] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[8] *Communications Satellite Corporation v. FCC*, 836 F.2d 623 (D.C.Circuit 1988).

[9] 836 F.2d at 631, n. 13.

[10] *Id.*

[11] *GTE Spacenet Corp., et al.*, 2 FCC Rcd 2477 (Com. Car. Bur. 1987); *remanded*, 4 FCC Rcd 2071 (1989).

[12] Letter dated 1989 from George S. Li, Chief, International Facilities Division to Gerald Oberst, Esq. *et al.*, Attorneys for *Transborder XIII* applicants.

[13] We also note that other applications request authority to provide service "between" the U.S. and transborder locations. Unlike the Contel ASC and CFS applications, we have not construed these applications, despite their broad service descriptions, as proposing to provide two-way services between the U.S. and points other than Canada and Mexico. As we have noted in past Transborder decisions, the authority granted herein must be read as being consistent with current consultations under Article XIV(d) of the INTELSAT Agreement. Thus, to the extent that such service was intended, those requests are also deferred.

[14] *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985); on *recon.*, 61 R.R. 2d 649 (1986); *further recon.*, 1 FCC Rcd 439 (1986).

[15] *See* Alpha Lyracom, d/b/a Pan American Satellite, 4 FCC Rcd 8649 (1989). PAS-1 is authorized to provide service via its Ku-band capacity between the United States and the Bahamas, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (see note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in

		Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

the United Kingdom. PAS-1 is authorized to provide service via its C-band capacity between the United States and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-26

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to require that VHF ship station transmitters automatically cease operation after a predetermined period of operation. RM-6770

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 2, 1991; Released: January 16, 1991

By the Commission:

I. INTRODUCTION

1. By a *Notice of Proposed Rule Making* (*Notice*), 5 FCC Rcd 647 (1990), the Commission proposed to amend Part 80 of the Rules, 47 C.F.R. Part 80, to require that VHF ship station transmitters be equipped with (1) an automatic timing device that deactivates the transmitter after an uninterrupted transmission period of more than three minutes and (2) a device that provides an indication that the timer has deactivated the transmitter. This *Report and Order* adopts the rule amendments substantially as proposed.

II. BACKGROUND

2. VHF channels in the 156-162 MHz band are used in the maritime mobile service by ship stations to communicate with other ship stations or with coast stations. Channels are available for safety communications, calling,[1] operational and navigational purposes. *See* Section 80.373(f) of the Commission's Rules, 47 C.F.R. § 80.373(f). Additionally, channels are available for public correspondence communications.

3. Channel 16 (156.800 MHz) is the international safety, distress and calling channel. The United States Coast Guard (USCG) maintains an aural watch on channel 16 and responds to distress calls made on this channel. Cargo ships over 300 gross tons and ships that carry more than six passengers for hire must be equipped with VHF stations and maintain a watch on channel 16 for compliance with the Communications Act of 1934, as amended, the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between the United States of America and Canada for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352. Any United States ship that is voluntarily equipped with a VHF station is required to maintain a watch on channel 16 when the station is turned on and not being used for other traffic. While VHF channels may be used to meet a variety of communications requirements, the primary purpose of these channels is to provide for the safety of life and property at sea. Thus, it is extremely important to minimize interference on these channels.

4. As we stated in the *Notice*, a "stuck carrier," a continuous signal radiated by the inadvertent operation of a marine VHF transmitter, can cause significant interference to the maritime service. For example, the Commission's Field Operations Bureau (FOB) reported in its 1987 Boston Regional Marine Safety Project Report that it had located thirty "stuck carriers" on channel 16 in 1987, twenty-nine of which were caused by unintentional activation of the transmitters. The Boston region estimates, however, that only a small percentage of the total number of "stuck carriers" are reported.

5. To minimize the problem of "stuck carriers," we proposed to require that transmitters be equipped with an automatic timeout timing device and a device that provides an indication that the timer has deactivated the transmitter. We also proposed equipment phase-out periods. Along with our proposals we asked for comments on certain issues such as the time period before deactivation, additional manufacturing costs, and the effect of our proposal on public correspondence and duplex operations. Comments were filed by Southern California Marine Radio Council (SCMRC), Radio Technical Commission for Marine Services (RTCM), North Pacific Marine Radio Council (NPMRC), National Party Boat Owners Alliance, Inc. (Alliance), Uniden America Corporation (Uniden), Stephens Engineering Associates (SEA), Mr. Bradford D. Carey (Carey), United States Coast Guard (USCG), and Tandy Corporation (Tandy). Reply comments were filed by Tandy.

III. DISCUSSION

6. The commenters all agree that a signal time-out timer incorporated into VHF transmitters will help alleviate the problem of "stuck carriers." We believe, therefore, that the public would benefit in terms of increased marine safety by a requirement that signal time-out timers be incorporated into VHF ship transmitters.

7. In the *Notice* we proposed to require deactivation after three minutes of continuous uninterrupted operation. Four of the commenters felt that the three minute proposal was reasonable. SEA, however, commented that three minutes was too short a period of time, particularly for public correspondence channels, and suggested they have a ten minute time-out timer. Carey asserted that the Commission's proposed three minute interval seemed to be the minimum acceptable amount of time and that a longer period such as five, six or even ten minutes would be more appropriate. Uniden proposed a tolerance of plus or minus 20 per cent on the required deactivation period to allow for variation in the supply voltage as well as for environmental considerations. Also, Uniden, RTCM and Tandy proposed that portable marine VHF radios that operate with an output power of 5 watts or less be excluded from the automatic deactivation requirement. They asserted that, due to the limited power used by these radios, their transmissions do not significantly contribute to the problem. Additionally, they argued that these handheld transceivers are battery-operated and would quickly lose power if they remained in the "talk" mode for any extended period of time.

8. We are adopting five minutes as the time period before deactivation is required. We agree with SEA and Carey that three minutes could in some cases interrupt communications. A five minute time out period represents a reasonable compromise. A five minute time out period minimizes both the "stuck carrier" problems and the potential for impairing effective maritime communications. We agree with Uniden that a tolerance on the deactivation period is appropriate. The 20 per cent tolerance suggested by Uniden, however, is excessive given current manufacturing technical capabilities. We have modified our proposal to incorporate a plus or minus 10 per cent tolerance. In regard to exempting low power portables, we have previously exempted hand-held equipment from other requirements applicable to marine VHF transmitters.[2] Because their low power minimizes their interference potential, we are exempting hand-held VHF ship transmitters from the time-out timer requirements adopted herein.

9. In the *Notice* we proposed to require any VHF ship station transmitter manufactured in or imported into the United States after July 31, 1992, or installed after July 31, 1993, to be equipped with an automatic time-out timer. We also proposed that VHF ship station transmitters installed on or before July 31, 1993, be grandfathered indefinitely while located at the same ship station or coast station. We requested comments on whether the proposed phase-out periods are sufficient to minimize the impact on manufacturers, dealers and consumers. SEA, Alliance, and NPMRC supported the Commission's proposed implementation schedule. Uniden argued that a one year separation between the manufacture and import date of July 31, 1992, and installation date of July 31, 1993, is not sufficient time for those users that purchase complying devices just prior to July 31, 1992. It submitted that substitution of the word "purchased" for the word "installed," as it pertains to this issue, would provide a more equitable requirement for these users. Uniden also contended that tying the application of the proposed rule change to the transceiver installation date could lead to significant enforcement problems, and that the proposed language places unfair restrictions on boaters who use portable VHF radios or boaters who remove their radio equipment from their boats prior to placing them in storage. Uniden contended that these users would be unable, under the proposed language, to "re-install" the equipment in their boats. Tandy proposes a two year phase-out period to begin only after the final rules have been adopted and released by the Commission, and that any reference to installation in the Rules should be deleted. Carey supports a July 31, 1991, date for manufacture or importation, and a July 31, 1992, date for installation.

10. In general, we believe the phase-out periods proposed in the *Notice* are appropriate. As suggested by Tandy, however, we are modifying our original proposals to take into account the date these rules are actually adopted. Uniden suggested tying the application of the rule to the purchase date rather than the installation date. We have used the installation date before as a cutoff and see no reason why it cannot be used here, particularly in view of the modification of the proposed dates discussed above. [3] As to Uniden's question concerning portable radios, it appears that Uniden may have misunderstood this aspect of our proposal. We proposed to grandfather VHF transmitters that are initially installed on or before July 31, 1993, to minimize the economic burden on the boating community. These rules are not intended to restrict owners from removing and subsequently re-installing at the same maritime station VHF radio equipment after storage or other non-operational periods. Accordingly, as noted above, we are modifying the proposed phase out periods to require VHF ship station transmitters manufactured or imported into the United States after July 31, 1993, or initially installed after July 31, 1994, to be equipped with an automatic time-out timer. Further, VHF ship station transmitters installed on or before July 31, 1994, are grandfathered indefinitely while located at the same ship station or coast station.

11. The *Notice* also requested comments on the effect a time-out timer would have on public correspondence and duplex operations. RTCM commented that it has received no information to indicate that transmitter deactivation would create a serious problem for duplex operation in the United States, but acknowledged that it could cause a problem for public correspondence callers and foreign coast stations on full duplex public correspondence channels. It suggested that provisions might be examined to by-pass automatic deactivation when selecting frequencies employed for full duplex public correspondence operation. Carey and SEA also expressed concern over the proposal's effect on public correspondence or other duplex channels. We agree with the commenters that time-out timers could cause problems to marine operator assisted telephone calls on duplex channels. Such calls could exceed three or even five minutes in length and an automatic disconnect could be disruptive and expensive. Therefore, we will not require time-out timers to be activated when the transmitter is operating on public correspondence channels.[4]

12. The *Notice* proposed requiring a device to indicate clearly when the time-out timer deactivates the transmitter and requested comments on whether the particular deactivation device should be a matter of manufacturer discretion, as proposed, or specifically required to be visual, aural, or both. Tandy, which proposed an aural deactivation alarm device, was the only commenter expressing any preference for whether an aural or visual device should be required. Other commenters said to leave it up to the manufacturer. Accordingly, we are adopting rules requiring a device to clearly indicate when the time-out timer deactivates the transmitter. Absent a clear preference, we are leaving the particulars of this device up to the manufacturer.

13. SEA and RTCM suggested that transceivers be required to revert to the receiving mode after the timer has deactivated the transmitter. Our intent in the *Notice* was to have the receiver activated when the transmitter is deactivated. We have explicitly provided for this in the Rules.

IV. PAPERWORK REDUCTION ACT STATEMENT

14. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease the burden hours imposed on the public.

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

I. Need and purpose of this action:

This action is taken to incorporate into the Commission's Rules a requirement to eliminate prolonged inadvertent keying of VHF shipboard transmitters operating in the maritime mobile service. The rules require manufacturers of VHF shipboard radio equipment to design the transmitters to include a timing device that automatically deactivates the transmitter when operating on private communications frequencies after a predetermined period of time and a device that indicates that the carrier has been turned off by the timer. The objective is to phase out the prolonged inadvertent keying of VHF shipboard transmitters. These new rules enhance maritime safety and conserve enforcement resources.

II. Issues raised by the public in response to the Initial Regulatory Flexibility Act Analysis:

No comments were received addressing the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The questions raised in this proceeding address the sufficiency of the proposed phase-out period for the manufacture and installation of newly type-accepted VHF ship station transmitters to minimize the impact on manufacturers, dealers and consumers. Significant alternatives considered and rejected were: (1) a one year separation between the manufacture and import date of July 31, 1992 and a "purchase" date of July 31, 1993; (2) a two year phase out period for existing VHF equipment in stock to begin only after the final rules have been adopted and released by the Commission; and (3) tying the application of the rule to the purchase date rather than to the installation date. These alternatives were rejected for the reasons discussed in the text of the Report and Order.

ORDERING CLAUSES

Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 303(f) and (r), Part 80 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

IT IS FURTHER ORDERED that this Report and Order will be effective on **March 4, 1991.**

IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 St at. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.203, the first sentence in paragraph (a) is revised, paragraphs (c) through (k) are redesignated as paragraphs (d) through (l), and new paragraphs (c) and (c)(1) are added to read as follows:

§ 80.203 Authorization of transmitters for licensing.

(a) Each transmitter authorized in a station in the maritime services after September 30, 1986, except as indicated in paragraphs (g), (h) and (i) of this section, must be type accepted by the Commission for Part 80 operations.

* * *

* * * * *

(c) All VHF ship station transmitters capable of operation on frequencies contained in § 80.373(f) that are either manufactured in or imported into the United States, on or after August 1, 1993, or are initially installed on or after August 1, 1994, must be equipped with an automatic timing device that deactivates the transmitter and reverts the transmitter to the receive mode after an uninterrupted transmission period of five minutes, plus or minus 10 per cent. Additionally, such transmitters must have a device that indicates when the automatic timer has deactivated the transmitter. VHF ship station transmitters initially installed before August 1, 1994, are authorized for use indefinitely at the same maritime station.

(1) Hand-held transmitters are not required to comply with the requirements in paragraph (c) above.

* * * * *

FOOTNOTES

[1] Channel 16 serves as the gateway channel for establishing contact with, or "calling" other ships.

[2] *See*, for example, 47 C.F.R. § 80.215(g) exempting portable transmitters from the requirement to maintain a carrier power of at least 8 but not more than 25 watts; and 47 C.F.R. §

80.215(g)(4) exempting portable transmitters from the requirement to automatically reduce carrier power to one watt or less when the transmitter is tuned to 156.375 MHz or 156.650 MHz.

[3] *See*, for example 47 C.F.R. §§ 80.203(b) and 80.209(a).

[4] Public correspondence channels, which are separately described in Section 80.371 of the Commission's Rules, 47 C.F.R. § 80.371, are not affected by this rule change.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-123-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Buffalo, New York (Call Sign E890937) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-124-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Baltimore, Maryland (Call Sign E890936) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-125-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Kansas City, Missouri (Call Sign E890938) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-126-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Waipahu, Hawaii (Call Sign E890935) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-127-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Sacramento, California (Call Sign E890939) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-133-ML

Application for authority to modify its license for a 5.5-meter C-band transmit/receive fixed earth station at Colorado Springs, Colorado (Call Sign E890929) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-134-ML

Application for authority to modify its license for a 5.5-meter C-band transmit-only fixed earth station at Charlotte, North Carolina (Call Sign E890984) for the provision of services between the United States and Canada, Mexico the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-135-ML

Application for authority to modify its license for a 2.4-meter Ku-band transmit/receive fixed earth station at Culver City, California (Call Sign E860811) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-90-030-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Plymouth, Massachusetts (Call Sign E900181) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-90-058-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Dallas, Texas (Call Sign E900219) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications, filed by IDB Communications Group, Inc., (IDB) requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses to establish channels of communications to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. These applications were placed on the Commission's public notice. No comments were received. None of the applications involve technical modifications.

THE APPLICATIONS

2. In file Nos. File Nos. CSG-89-123-ML, CSG-89-124-ML, CSG-89-125-ML, CSG-89-126-ML, CSG-89-127-ML, CSG-89-134-ML, CSG-90-030-ML, and CSG-90-058-ML, IDB seeks authority to modify its licenses for seven 5.5-meter fixed C-band transmit-only earth stations at Buffalo, New York, Baltimore, Maryland, Kansas City, Missouri, Waipahu, Hawaii, Sacramento, California, Charlotte, North Carolina, Plymouth, Massachusetts, and Dallas, Texas (Call Signs E890937, E890936, E890938, E890935, E890939, E890984, E900181, and E900219) for the provision of transborder service. Additionally in File No. CSG-89-133-ML, IDB seeks authority to modify its license for a 5.5-meter C-band transmit/receive fixed earth station at Colorado Springs, Colorado (Call Sign E890929) to permit the provision of transborder service. The earth stations are currently used for the nationwide distribution via satellite of radio programming. IDB now proposes to use these earth stations for the provision of services from the United States to Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos satellite systems.

3. In File No. CSG-89-135-ML IDB seeks authority to modify its license for a 2.4-meter Ku-band transmit/receive fixed earth station at Culver City, California (Call Sign E860811) for the provision of transborder service. The earth station will be used for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites. This earth station is currently used to transmit audio, and/or data communications and to distribute such programming through national satellite distribution channels.

DISCUSSION

4. In 1981, following consultations with the Department of State, the Commission established its Transborder policy which permits the use of domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites.[1] Under this policy, domestic satellites may be used for these services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. The Transborder policy also set forth procedures for final implementation of these services. Pursuant to these procedures, consultations under Article XIV(d) of the INTELSAT Agreement have been completed for transborder services between the United States and Canada, the United States and Mexico, and from the United States to Latin American/Caribbean locations.[2]

5. The subject applications request authority to provide services similar to those previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. The subject earth stations were initially authorized to facilitate the nationwide distribution by satellite of radio programming. The instant applications involve the modification of IDB's domestic earth station licenses for the subject stations to extend the existing distribution of programming in the United States to various transborder locations.

6. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's Transborder policy

and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical. [3] This is particularly the case where, as here, the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations for little or no additional cost.[4] In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum.

7. Accordingly, IT IS ORDERED that the applications of IDB Communications Group, Inc. (IDB): File Nos. CSG-89-123-ML, CSG-89-124-ML, CSG-89-125-ML, CSG-89-126-ML, CSG-89-127-ML, CSG-89-133-ML, CSG-89-134-ML, CSG-89-135-ML, CSG-90-030-ML, and CSG-90-058-ML., ARE GRANTED and the applicant is authorized to modify the licenses for its existing earth station facilities to establish channels of communication to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

8. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

9. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In addition to U.S. domestic satellites, the Transborder policy also encompasses the use of Canadian and Mexican domestic satellites.

[2] *See* Attachments 1 and 2.

[3] *Satellite Business Systems*, 88 FCC 2d 195 (1981).

[4] *Transborder Satellite Video Services*, 88 FCC 2d 258 (1981). The same considerations are applicable with respect to the provision of receive-only data as proposed in IDB's application File No. CSG-89-135-ML.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (see note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in

		Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION — File No. I-T-C-90-193

Application for authority to acquire and operate facilities for service between the U.S. and Czechoslovakia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 10, 1991; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on September 25, 1990 by MCI Telecommunications Corporation (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for provision of direct service between the U.S. and Czechoslovakia. The application was placed on public notice on October 4, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Czechoslovakia by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-193 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite half-circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Czechoslovakia, furnished by MCI's correspondent in Czechoslovakia;

b. lease from AT&T and operate 24 voice-grade circuits in the Etam, West Virginia earth station;

c. lease and operate 24 voice-grade circuits between the Etam, West Virginia earth station and MCI's West Orange, New Jersey operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice services, between the U.S. and Czechoslovakia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Czechoslovakia, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION

Application for authority to acquire and operate facilities for direct service between the U.S. and Hungary.	File No. I-T-C-91-001
Application for authority to acquire and operate facilities for direct service between the U.S. and U.S.S.R.	File No. I-T-C-91-002

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 10, 1991; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by MCI Telecommunications, Corporation (MCI), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for the provision of direct service between the U.S. and Hungary and the U.S.S.R. The applications were placed on public notice on October 10, 1990. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Hungary and the USSR by MCI.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-001 and I-T-C-91-002 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 84 voice-grade satellite half-circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean;

b. lease from AT&T and operate 84 voice-grade circuits in the Etam, West Virginia earth station;

c. lease and operate 84 voice-grade circuits between the Etam, West Virginia earth station and MCI's West Orange, New Jersey operating center; and

d. use these facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S., on the one hand, and Hungary - 36 voice-grade circuits, and the U.S.S.R - 48 voice-grade circuits, on the other hand, and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Hungary and the U.S.S.R, and copies of the agreements shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-560

In re Applications of

WHITE CONSTRUCTION CO., INC. (hereafter "White")	File No. BPH-880816NY
JOHN K. MCCANLESS (hereafter "McCanless")	File No. BPH-880816OG
JOHN NORMAN & DONALD LESKO (hereafter "Norman")	File No. BPH-880816OU

For Construction Permit
for a New FM Station
in Chiefland, Florida
Channel 247A (97.3 MHz)

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. The captioned applicants have each proposed transmitting antenna sites short-spaced to sites involved in pending petitions for reconsideration concerning Channel 247C2 in Micanopy, Florida and Channel 300A in Chiefland. Accordingly, the applicants will be allowed to proceed to comparative hearing but, in the event of grant of any of the captioned applicants, such grant will be made contingent on the final action regarding the noted petitions.

3. *Other matters*. McCanless and Norman propose to locate their antennas on an existing tower situated near the intersection of US 19, 98 and State Road 345 in Chiefland. The tower data submitted in their respective applications is inconsistent with that contained in the Commission's Records. Where our Antenna Survey Branch records reveal clearance (FAA Study 86-ASO-985-OE) for a tower 152.4 meters above ground level (AGL)/ 157 meters above mean sea level (AMSL), both applicants list these heights as 122 meters AGL and 133 meters AMSL. The applicants propose to locate on an existing tower licensed to an existing Commission licensee, and specific reference is made to these towers. Since use of either data would not cause the proposals to violate any Commission Rule, the discrepancies do not affect either applicant's acceptability. However, both will be required to clarify and/or correct these discrepancies by submitting the appropriate amendment to the presiding Administrative Law Judge.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Neither White nor McCanless have completed Item 4 correctly. White's application merely gives a city and state as the residence address for its principals; McCanless lists a post office box as his residence address. Accordingly, White and McCanless must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in the event of grant of any of the captioned applicants, such grant will be conditioned upon the disposition of petitions for reconsideration concerning Channel 247C2 in Micanopy, Florida and Channel 300A in Chiefland, Florida.

8. IT IS FURTHER ORDERED, That McCanless and Norman must submit an amendment clarifying and/or correcting the tower height discrepancies specified in paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That White and McCanless shall submit amendments containing the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-573

In re Applications of

CLOVER COMMUNICATIONS, INC. (hereafter "Clover")	File No. BPH-880713MH
STEPHEN E. POWELL (hereafter "Powell")	File No. BPH-880714MJ
SNAPP BROADCASTING, INC. (hereafter "Snapp")	File No. BPH-880714MY
TBM LIMITED PARTNERSHIP (hereafter "TBM")	File No. BPH-880714NC
S&J ASSOCIATES, INC. (hereafter "S&J")	File No. BPH-880713MM (Previously Returned)

For Construction Permit
for a New FM Station on Channel 293A
(106.5 MHz) in Farmington,
New Hampshire

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Staff review of S&J's application, as originally filed, determined that the application did not include a site-availability certification. Consequently, on November 22, 1988, S&J's application was returned because it was found not sufficient for tender. On December 20, 1988, S&J filed a petition for reconsideration of this action along with the required site-availability certification.

3. S&J's application had been found untenderable because it lacked the requisite site-availability certification. This information is required pursuant to Item 2, Appendix D, *Report and Order* in Docket MM 84-750, 50 Fed Reg. 19936 (1985). The *Report and Order* indicates that failure to provide the requisite certification in the form set forth in Appendix B of the *Report and Order* in Docket MM 84-750, *supra*, will result in the application being deemed not substantially complete.

4. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. Sections 1.106(c) and (d). In the absence of such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *affd. sub nom. Lorain Journal Co. v. FCC*, 351 F 2d 824 (D.C. Cir. 1965), cert den. 383 U.S. 967 (1966); *Employment Practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Furthermore, in accordance with the *Report and Order*, *supra*, the only basis for reversing an earlier finding of untenderability is demonstration that the Commission erred in its earlier determination. *See* specifically, Appendix D to the *Report and Order*, *supra*.

5. The S & J petition for reconsideration does not demonstrate that the finding of untenderability of the subject application as originally filed was erroneous. Rather, it appears to admit that the application as originally filed was unacceptable and merely submits the corrected data. Therefore, reconsideration is not warranted. Accordingly, the amendment will be returned, and the petition for reconsideration denied.

6. *Clover.* Mary Buckwald, Raymond Garon and Christopher Sluicer, the principals of Clover, are each employed at WCNL-AM/FM, Newport, NH. Each has indicated his intent to terminate his relationship with WCNL-AM/FM in the event of grant of the referenced application. Accordingly, in the event of grant of Clover's application, Buckwald, Garon and Sluicer will each be required to sever all connections with WCNL-AM/FM prior to the commencement of program test authority.

7. *Powell.* Powell was an applicant for a construction permit for a new television station in Memphis, Tennessee, mutually exclusive with RKO General, WHBQ-TV's renewal application. *See* MM Docket Nos. 84-1213 through 84-1225. The presiding Administrative Law Judge in the Memphis proceeding specified the following issue against Powell (*See, Memorandum Opinion and Order*, FCC 85M-858, released February 27, 1985):

> To determine whether Stephen E. Powell made misrepresentations to the Commission or lacked candor when he stated in his testimony in the Berlin (New Hampshire, WMOU-FM) proceeding that Robert R. Powell, Sr. would not be employed at WMOU-FM and that Stephen Powell would serve as Sales Manager, and to determine the impact of these misrepresentations and lack of candor, if any, on the basic and/or comparative qualifications of Stephen E. Powell to be a licensee in this proceeding.

Subsequently, Powell's application was dismissed in the Memphis proceeding for failure to prosecute. Consequently, the issue was not resolved. This unresolved issue calls into question Powell's qualification to be a Commission licensee. Therefore, the unresolved issue will be specified and tried against Powell in this proceeding.

8. Powell petitioned for leave to amend his application on May 5, 1989. The accompanying amendment was filed after December 29, 1988, the last date for filing minor

amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

9. *Snapp*. An applicant for a construction permit is required to certify that it is financially qualified to construct and operate its proposed facility for three months with revenue. Snapp's response to Section III, FCC Form 301 (Financial Qualifications), indicates that it was unable to certify its financial qualifications at the time it filed its application. To date, no amendment has been received which indicates that the applicant is now able to certify that it is financially qualified. Accordingly an appropriate issue will be specified.

10. The antenna data filed by Snapp does not agree with the data which was submitted to the FAA. Accordingly, Snapp will be required to refile with the FAA or amend its application to agree with the data filed with the FAA. Moreover, Snapp will be required to either notify the presiding Administrative Law Judge that it has refiled with the FAA or submit the appropriate amendment to the presiding Administrative Law Judge within 30 days after this Order is released.

11. Since no determination has been made as to whether the antenna proposed by Snapp would constitute a hazard to air navigation, an issue with respect thereto will be included and the FCC made a party to the proceeding.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Stephen E. Powell made misrepresentations to the Commission or lacked candor when he stated in his testimony in the Berlin (New Hampshire, WMOU-FM) proceeding that Robert R. Powell, Sr. would not be employed at WMOU-FM and that Stephen Powell would serve as Sales Manager, and to determine the impact of these misrepresentations and lack of candor, if any, on the basic and/or comparative qualifications of Stephen E. Powell to be a licensee in this proceeding.

2. To determine with respect to Snapp whether the applicant is financially qualified.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by Snapp would constitute a hazard to air navigation.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petition for reconsideration filed by S&J IS DENIED, and the corresponding amendment IS HEREBY RETURNED.

15. IT IS FURTHER ORDERED, That, in the event of grant of Clover's application, Mary Buckwald, Raymond Garson and Christopher Sluicer will each divest all interest in and sever all connection with Stations WCNL-AM/FM prior to the commencement of program test authority.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Powell IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That Snapp shall file an amendment as prescribed in paragraph 10, above, with the presiding Administrative Law Judge within 30 days after this Order is released.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-572

In re Applications of

SUSAN H. BAY (hereafter "Bay")	File No. BPH-890111MA
LOUIS M. ANZEK AND LEISA M. ANZEK (hereafter "Anzek")	File No. BPH-890112MJ
POINTE BROADCASTING, INC. (hereafter "Pointe")	File No. BPH-890112ML
NATIVE AMERICAN BROADCASTERS, INC. (hereafter "Native")	File No. BPH-890112MM
HIGH LEVEL VENTURES (hereafter "Ventures")	File No. BPH-890112MN

For Construction Permit
for a New FM Station on
Channel 225A in Lebanon, Tennessee

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Native.* At the time the instant application was filed, Native principal Fritz R. Niggeler was an officer, director, and 33 1/3% shareholder in American Indian Broadcast Group, Inc. (AIBG).[1] AIBG then had on file with the Commission some 13 FM broadcast applications.[2] The following issues were designated against AIBG in the *Hearing Designation Order* for Topeka, Kansas, MM Docket 89-293, DA 89-669, 4 FCC Rcd 5204 (released June 27, 1989):

> 1. To determine: (a) whether [AIBG's] filing of the instant application constituted a violation of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555; and
>
> (b) if so, whether the filing of [AIBG's] application constituted a violation of the Commission's inconsistent application rule, 47 C.F.R. § 73.3518 which, if so, would warrant dismissal of the application.

AIBG presented evidence that Mr. Niggeler and Mr. Jack Bursack, another officer, director, and 33 1/3% shareholder, were of American Indian extraction and thus AIBG qualified as a minority controlled entity. *See* AIBG Exhibit 4 in MM Docket 89-293, received into evidence at hearing of January 20, 1990, at p. 186 of the hearing transcript. However, AIBG dismissed its application prior to the resolution of the issue. *See Memorandum Opinion and Order*, FCC 90M-1466, released June 4, 1990. Thus, no formal finding was made regarding Mr. Niggeler's minority status.

3. A violation of the inconsistent application rule occurs *at the time of filing* of the application in question. Thus, if Mr. Niggeler is not, as is claimed, an American Indian, his filing of this application without an appropriate request for waiver of the multiple ownership rules would mandate return of the application as unacceptable for filing under Section 73.3518. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3492 (1987). It does not matter for purposes of this issue that Mr. Niggeler is no longer connected with AIBG as the violation, if any, occurred with the filing of this application due to Mr. Niggeler's cognizable interest in the 13 other AIBG applications. Because we have no evidence here that Mr. Niggeler is indeed an American Indian, and because the Topeka application did not resolve the issue of Mr. Niggeler's (and, for that matter, Mr. Bursack's) heritage, we will designate identical issues in this proceeding.

4. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Pointe has filed such statement, it is deficient. Pointe has not listed any specific local recruitment sources for women. Accordingly, Pointe will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. Ventures petitioned for leave to amend its application on January 10, 1990 and on June 26, 1990. The accompanying amendments were filed after May 11, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Ventures have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Ventures would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the propos-

als. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine whether Native's filing of the instant application constituted a violation of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555; and

(b) if so, whether the filing of Native's application constituted a violation of the Commission's inconsistent application rule, 47 C.F.R. § 73.3518 which, if so, would warrant dismissal of the application.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Ventures would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Pointe shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Ventures ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On May 3, 1989, Mr. Niggeler left the company.

[2] These were for Hartford, Michigan (BPH-870820MB); Alamogordo, New Mexico (BPH-870820MC); Atlantic City, New Jersey (BPH-970827MQ); Lawton, Oklahoma (BPH-870827NG); Germantown, Tennessee (BPH-870908MQ); DeWitt, Michigan (BPH-870914MC); State College, Pennsylvania (BPH-870916MB); San Angelo, Texas (BPH-870921MB); Windsor, Virginia (BPH-870928MC); South Yarmouth, Massachusetts (BPH-990107NI); Topeka, Kansas (BPH-871124MM); Vero Beach, FLorida (BPH-880523MF); and Post, Texas (BPH-870803MC).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-602

In re Applications of

THOMAS A. RUSK (hereafter "Rusk")	File No. BPH-890208MA
LITTLE ROCK RADIO, INC. (hereafter "Little Rock")	File No. BPH-890209MA
NORTH LITTLE ROCK BROADCASTING, LTD. (hereafter "North Little Rock")	File No. BPH-890209MB

For Construction Permit
for a New FM Station on Channel 266A
in North Little Rock, Arkansas

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rusk*. An engineering study of Rusk's application reveals a discrepancy with respect to the indicated values for the proposal's site elevation above mean sea level (AMSL). Specifically, in Section V-B, Item 7(a)(1) of the application, the listed site elevation AMSL is 116 meters. However, the site elevation depicted on the site map submitted as Exhibit 5 to the application indicates a site elevation AMSL of 110 meters. Since neither of these values results in a violation of any Commission rule, the discrepancy is neither a tenderability nor an acceptability defect. However, Rusk will be required to file an amendment to correct the problem.

3. *Little Rock*. Alan H. Potamkin, principal of Little Rock, has an ownership interest in the following non-communications entities, against which the following complaints alleging equal employment opportunity (EEO) complaints are pending: (i) *Thomas Gilmore v. Potamkin Chevrolet* (Philadelphia) - EEOC - Charge No. 170890020, October 12, 1988; (ii) *Eva Sieberling v. Potamkin Auto Mall* (Philadelphia) Philadelphia Commission on Human Rights - Charge No. 17G890035, October 19, 1988; (iii) *Gale L. Schuber v. Potamkin Ford* (Atlanta) - EEOC August 17, 1987 - U. S. District Court for the Northern District of Georgia (Atlanta Division) - Case No. 1:88-CV-952-LV, April 29, 1988; and, (iv) *Raymond Angulo v. Potamkin Toyota* (Miami) - Metro Dade Co. Fair Housing and Equal Opportunity Appeals Board - EEOC - Charge No. 150890127, October 24, 1988. An appropriate condition will therefore be specified below.

4. The engineering data submitted by Rusk, Little Rock and North Little Rock do not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. However, the FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that the 3.16 mV/m contour of each of these applicants is in substantial compliance with this requirement in that it will cover over 80% of the community of license. Accordingly, no waiver is required.

5. North Little Rock petitioned for leave to amend its application on September 13, 1989 and April 5, 1990. The accompanying amendments were filed after July 3, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Rusk shall submit an amendment correcting its proposed site elevation AMSL to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Little Rock as a result of this proceeding, its grant will be subject to whatever

action, if any, the Commission may deem appropriate, in light of the outcome of the complaint proceedings listed in paragraph 3 above.

11. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) by Rusk, Little Rock and North Little Rock ARE DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by North Little Rock ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-605

In re Applications of

DORSEY EUGENE NEWMAN (hereafter "Newman")	File No. BPH-890216MA
FM RADIO, INC. (hereafter "FRI")	File No. BPH-890217MM
CAROLYN E. MCMILLAN (hereafter "McMillan")	File No. BPH-890217MN
DR. NORMA J. FISHER (hereafter "Dr. Fisher")	File No. BPED-890217MA (Dismissed Herein)

For Construction Permit
for a New FM Station on Channel 291A
in Hartselle, Alabama

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Dr. Fisher.* Engineering analysis of Dr. Fisher's application reveals a short-spacing of 5.2 kilometers between the applicant's proposed facilities and the allotment to Sheffield, Alabama, as well as a short spacing of 7.0 kilometers to an application filed by WBTG-FM (BPH-890628IE) Sheffield, AL. The WBTG-FM application proposes to upgrade the facility from Channel 292A to Channel 292C2 pursuant to the *Report and Order* in Docket No. 87-451, 3 FCC 2d 6849 (1988). The required distance in this instance is 105 kilometers; Dr. Fisher's application only results in an actual distance of 98 kilometers to the application and 99.8 kilometers to the Sheffield allotment.

3. Dr. Fisher failed to timely request a waiver of 47 C.F.R. § 73.207, the minimum mileage separation requirement. 47 C.F.R. § 73.3566(a) states, in pertinent part, that applications "patently not in accordance with FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for a waiver will not be accepted for filing, or if inadvertently accepted for filing will be dismissed". Thus, Dr. Fisher's application must be dismissed as inadvertently accepted for filing because it is not in compliance with the spacing rules and she failed to include a request for waiver of these rules. *See Donovan Burke*, 60 RR 2d 110 (1986).

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, the application filed by Dr. Fisher IS DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HYE CREST MANAGEMENT, INC. File No. 10380-CF-P-88

For License Authorization in the Point-to-Point Microwave Radio Service in 27.5 - 29.5 GHz Band and Request for Waiver of the Rules

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 1991; Released: January 18, 1991

By the Commission:

1. Hye Crest Management, Inc. ("Hye Crest") has filed the above-captioned application to construct and operate a new fixed station in the Point-to-Point Microwave Radio Service to be located in Brooklyn (Brighton Beach), New York. It also requests a waiver of Sections 21.108 and 21.700 of the Commission's Rules, 47 C.F.R. §§ 21.108, 21.700, to use frequencies in the 27.5 - 29.5 GHz range ("28 GHz band") as a non-common carrier, for the provision of video service via a network of broadbeam and omni-directional transmitting antennas within the New York Standard Metropolitan Statistical Area ("SMSA").[1]

2. Comments and objections regarding Hye Crest's proposal have been filed by The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company ("U.S. West"); The National Spectrum Managers Association, Inc. ("NSMA"); The Bell Atlantic Telephone Companies (collectively referred to as "Bell Atlantic"); BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (collectively referred to as "BellSouth"); New York Telephone Company and New England Telephone and Telegraph Company ("NYNEX"); Southwestern Bell Telephone Company ("SWBT"); Pacific Bell; Congressman Matthew J. Rinaldo; and Microband Companies Incorporated ("Microband").[2] The parties filing comments and objections in this proceeding are collectively referred to as "the Commenters".

APPLICATION

3. Hye Crest seeks authority to establish a network of omni-directional microwave radio transmitters operating in an unoccupied portion of the 28 GHz band to be used to distribute 24 channels of video service to apartments, hotels, and private homes throughout the New York City metropolitan area. According to Hye Crest's proposal, if authorized, the licensee would implement a multicell configuration video distribution system within its designated service area. The size of each cell would be 6 to 8 miles in diameter.

4. Hye Crest asks that the frequencies it requests be granted on a "designated service area basis" to be confined to the New York PMSA. A designated service area is requested because the short propagation range associated with the 28 GHz band requires frequency reuse, which can best be accomplished with a designated service area licensing scheme.[3] It proposes that the notification procedures of Section 21.711 of the Commission's Rules, 47 C.F.R. § 21.711, would be used for licensing each station beyond the first. It claims this licensing scheme will effectively avoid competing, mutually exclusive applications for each of its transmitters within its service area. Hye Crest proposes to achieve frequency reuse through the use of cross-polarization isolation at adjacent cell transmitter sites with alternately polarized low powered transmitters[4] that will serve each cell. One-half of the transmitters would use vertical polarization and the other half would use horizontal polarization, with adjacent cells employing opposite polarization.

5. Hye Crest requests that it be allowed to provide its service offering on a non-common carrier basis to enable it to use portions, or all of its transmission time and capacity for its own purposes.[5] It believes non-common carrier status will provide it with maximum flexibility to implement its proposed video service, to stimulate technological innovation, to increase competition in the video entertainment marketplace, and to provide it additional diversity and freedom to meet the particular communications needs of its customers.

6. Finally, Hye Crest declares that the public interest would be well served by the grant of its application because it will transform a frequency band now lying fallow into one that is commercially useful to provide an innovative and competitive source of video programming.[6]

COMMENTS AND OBJECTIONS

7. The Commenters generally submit that the omni-directional service proposed by Hye Crest is incompatible with the point-to-point microwave radio service for which the frequencies in the 28 GHz band are allocated; that because Hye Crest's proposal would require 1000 MHz of spectrum, or one-half of the band's frequencies, a grant of its proposal would constitute a *de facto* reallocation of the 28 GHz band; that future demands for the band should be fully considered; and that the issue of reallocation should be considered in the context of a Rule Making proceeding, rather than a waiver request.

8. Although U.S. West interposes no objection to the use of the 28 GHz band in the manner proposed, it argues that Hye Crest has not demonstrated an actual need for the anticipated video service and has not included a showing of projected circuit growth and orders for service from each customer as required by the Commission's Rules.[7] Moreover, it believes that existing spectrum allocations to the Multipoint Distribution Service ("MDS"), Private Operational Fixed Service ("OFS"), and other means of distributing over-the-air programming will adequately meet consumer demand for video services. U.S. West is also concerned that Hye Crest's proposal to treat the addition of transmitters within its proposed designated service area to its system as "minor facility modifications" not subject to Public Notice procedures may result in interference to other users of the 28 GHz band. It con-

tends it is imperative that all nearby licensees and applicants be made aware of what changes are contemplated so that interference-free operation can be ensured.

9. NSMA states that Hye Crest has mischaracterized its application as an application for regular authorization, rather than as a request for developmental authority. NSMA further states that Hye Crest's proposal to operate the facilities as a non-common carrier is inconsistent with Commission policy to grant developmental authorizations only to common carriers.

REPLIES

10. Hye Crest maintains that there is an unfulfilled need for competitive offerings of multichannel video service in the New York City area, and that the service it proposes will be able to meet that demand and to effectively compete with cable television and other forms of video delivery systems. It states competition with cable television will provide numerous benefits to the viewing public. First, the proposed 36 channel system[8] will be able to compete head-to-head with the facilities currently provided by cable television to approximately 2 million New York PMSA households in terms of diversity of programming and lower rates for service. Second, as to the approximately 1.6 million households currently unserved by cable, Hye Crest believes its system will encourage the expansion of cable television systems into these unwired areas. Because they do not have its channel capacity, Hye Crest says that none of the alternative video services mentioned by the Commenters can compete effectively with cable television in the New York City area.

11. Hye Crest defends its selection of the 28 GHz band on the grounds that it is the most suitable band available for providing 24 video channels. Hye Crest argues the 28 GHz band contains sufficient spectrum, is unoccupied, and equipment is currently available. Frequencies below 13.25 GHz[9] and above 40 GHz, according to Hye Crest, are not available. The 18 GHz and 23 GHz bands, even though not congested, are unsuitable because both bands are widely used in and around New York City, thereby making it impossible to find a contiguous band to support 24 video channels. Similarly, lack of sufficient bandwidth is a drawback to the use of the 31 GHz band. Hye Crest further explains that the 40 GHz band is not as wide as the 28 GHz band and is shared with broadcast television station operators that use portable transmitters, making long term frequency coordination difficult. Most importantly, the 40 GHz band has greater atmospheric attenuation.

12. Hye Crest believes its request to use 1000 MHz of spectrum is reasonable. It explains that its technical design is based on the use of frequency modulation ("FM") to transmit each video channel. Its design of 40 MHz channels is compatible with the standard FM video bandwidth currently utilized in consumer electronic products, thereby making it economically feasible to build low cost receivers. Hye Crest submits that, if an unforeseen demand for the 28 GHz band by point-to-point microwave radio carriers were to develop, it appears that co-channel operations of omni-directional and point-to-point microwave radio systems would be technically feasible, although problematic, in New York City, but that point-to-point microwave radio use in adjacent areas (*i.e.*, New Jersey, Connecticut) would be unaffected. In any event, states Hye Crest, commenting telephone companies have neither a need, nor the equipment, to operate in the 28 MHz band. Spectrum at 18 GHz, 23 GHz, and 1000 MHz at 28 GHz, remains available for point-to-point users.

13. Hye Crest states that developmental authority is neither appropriate nor necessary. It argues that it is proposing to provide a commercial communication service, not an experiment. Hye Crest observes that the usual license term for developmental authority runs only for a period of one year. In order to provide a competitive, viable alternative to cable television, Hye Crest insists that regular authority is necessary to ensure the public continued service, to permit it to amortize its construction costs and start-up expenses sufficiently to lower subscription rates to competitive levels, and to attract the amount of venture capital needed to cover the system's construction and initial operation costs.[10]

14. Hye Crest refutes the Commenters' claims that the better approach to spectrum management would be to initiate a Rule Making proceeding to consider Hye Crest's proposal. A Rule Making proceeding, says Hye Crest, is a long and cumbersome process requiring a minimum of two years to complete, with no guarantee that the public needs ultimately will be served. Hye Crest believes the waiver approach is an efficient and appropriate means of addressing the opportunities for a new and innovative service for the citizens of New York City that generally takes less time for Commission action than does a Rule Making initiative.

15. NSMA replies that its analysis shows that Hye Crest's proposal would result in probable harmful interference to any point-to-point microwave radio licensees wishing to operate in the 28 GHz band. Furthermore, NSMA submits that its technical analysis shows that Hye Crest's system proposal is not technically feasible because its receivers would be subject to harmful interference from nearby point-to-point transmissions, and consequently, cannot share the band with point-to-point systems. NYNEX replies that Hye Crest's application does not support its contention that its system would be economically viable in that it would likely serve only 14.03 percent of the households in the area it wishes to offer service.

16. Hye Crest replies that the Commenters' technical allegations are fatally flawed. For example, the Commenters erroneously assume that a point-to-point microwave radio station operating in the 28 GHz band would require an effective isotropic radiated power ("EIRP") of 55 dBW rather 28 dBW, which it would actually need. In addition, Hye Crest states that the Commenters fail to take into consideration numerous mitigating factors such as terrain blockage, noise floor, and polarization diversity. Hye Crest contends that if these mitigating factors had been included in the Commenters' interference calculations they would have seen that point-to-point and Hye Crest's point-to-multipoint systems can both operate without mutual interference, provided that reasonable and good engineering practices are employed. Hye Crest continues, stating that it has demonstrated that its transmitters have a statistically insignificant potential for interfering with any conventional point-to-point system. Consequently, says Hye Crest, some of the Commenters have been forced to argue that Hye Crest's application should be denied because of a possibility that an unbuilt and unplanned point-to-point station may some day interfere with the reception of Hye Crest's

communication services. If such a station were made operational, it is highly doubtful that it would cause any objectional interference within Hye Crest's service area. Hye Crest notes that since the frequencies in the 28 GHz band have very narrow beamwidths any point-to-point signal that should enter one of Hye Crest's receive antennas, even a few degrees off the main axis, would be greatly suppressed.

DISCUSSION

17. The initial issue to be resolved is whether the merits of Hye Crest's proposal should be considered in the context of its waiver request or in the context of a notice and comment Rule Making proceeding.

18. Section 7 of the Communications Act of 1934, as amended, 47 U.S.C.§ 157, charges the Commission to "encourage the provision of new technologies" in communications services offered to the public. We concur with Hye Crest that, under the circumstances of this proceeding, the waiver approach offers the most efficient and expeditious means available for accommodating Section 7 and allowing the introduction of this new communications service to New York City. The proposal is limited in scope to the New York PMSA, and there have been no additional proposals for other areas. A formal Rule Making proceeding to inquire as to the feasibility of permanently reallocating the 28 GHz band and establishing regulatory policies for the provision of a nationwide point-to-multipoint video service utilizing these frequencies would be premature. Although Hye Crest has indicated that its proposal is viable, and its proposal may well prove to be an innovative means to deliver video services to consumers, this will not be confirmed until it is actually implemented and subjected to the rigors of the marketplace. Should the proposal prove to be a success and the public benefits anticipated become a reality, a general investigation into alternate uses of the 28 GHz band would then be appropriate for consideration.

19. Furthermore, contrary to the claims made by many of the Commenters, grant of the waiver request does not establish a precedent that will ultimately lead to the *de facto* reallocation of the 28 GHz band. This same claim was made in previous proceedings where waivers to use frequencies for services other than those for which they were assigned have been sought. *See, e.g., Big Bend Telephone Company*, 2 FCC Rcd 2413 (1986). Our subsequent approval of the requests, however, did not "open the floodgates" to multitudes of similar waiver requests as was predicted.[11] Consequently, based on our experience, we do not anticipate that our action today will result in an onslaught of waiver requests, particularly in light of the unproven nature of the service proposed and the construction and operation milestones established as conditions to Hye Crest's authorization.

20. Traditionally, the Commission has granted requests for waivers to use frequencies for purposes other than those for which they are allocated where an applicant demonstrated that (1) the existing frequency allocation is not suited or insufficient to accommodate the applicant's requirements; (2) the frequencies requested are underutilized; (3) the proposed use of the frequencies will not be detrimental to their assigned users; and (4) the public interest will be served by a grant of the waiver.[12] The Commission has denied waiver requests where these criteria have not been met. *See, e.g., Leaco Rural Telephone Cooperative, Inc.*, note 11, *supra*.

21. In applying these criteria to the instant case, we find that Hye Crest has met the required showing for waiver. First, it has demonstrated that the 28 GHz band is the most suitable frequency band available for providing the proposed omni-directional video distribution service because the other bands allocated to common carriers and private operational fixed licensees are too narrow in bandwidth, not sufficiently contiguous, or not adequately protected to support 24 video channels.

22. Second, Hye Crest has shown that the proposed frequencies are under-utilized. Its frequency coordination survey reveals that there is no other entity within 125 miles of New York City that holds or has applied for an authorization for facilities in the 28 GHz band. Nor has there been a demonstration that any party, other than Hye Crest, has developed equipment capable of utilizing this band. Therefore, based on the record, it is reasonable to conclude that no party, other than Hye Crest, has imminent plans to use these frequencies.[13]

23. Third, Hye Crest has shown that the foreseeable demand by point-to-point microwave radio carriers for use of the 28 GHz band in New York City is practically non-existent. The 28 GHz band is one of five frequency bands allocated for short-haul microwave use.[14] Only two of these bands, 17.7-19.7 GHz ("18 GHz band") and 21.2-23.6 GHz ("23 GHz band") are presently utilized in New York City, and there has been no evidence presented to suggest that either band is approaching saturation. The 18 and 23 GHz bands contain a significant amount of spectrum (4,400 MHz). Hye Crest has shown that should the 18 and 23 GHz bands become congested, other spectrum alternatives for point-to-point microwave radio services would still be available. For instance, Hye Crest notes that techniques such as rechannelization, tighter frequency stability and the imposition of a "bits per/second/per Hertz" spectral efficiency standard could be employed to increase capacity for point-to-point microwave radio services. Moreover, if a demand to use the 28 GHz band were to materialize, 1000 MHz of spectrum would still be available for use by point-to-point microwave radio carriers, and the employment of reasonable and good engineering practices will enable these point-to-point carriers and Hye Crest to both operate without mutual interference. In view of the foregoing, we find that Hye Crest has adequately demonstrated that its proposed use of the 28 GHz band will not be detrimental to the band's assigned users.

24. Finally, it is clear Hye Crest's proposal offers public interest benefits. We note that none of the parties to this proceeding disputes that public benefits would be realized through increased competition and greater diversity in programming distribution and sources in the video marketplace.[15] Hye Crest's proposal seeks to provide such competition. Hye Crest has demonstrated that its proposal will facilitate the introduction of a novel and innovative use of previously unused spectrum. That spectrum would be used to bring a new and needed multichannel video service to the New York City market in competition with cable television and other video delivery and distribution services, with no foreseeable harm to the 28 GHz band's assigned users.[16] Hye Crest has shown that nearly one-half of the households in this market are not wired for cable television service, and those that are wired may benefit

from the lower costs and increased programming choices that increased competition can offer. Furthermore, our action comports fully with the Commission's recent report to Congress which stated that the development of alternative multichannel video services has the potential to encourage significant competition to established cable television systems. *See Cable Television Report*, para. 111, *supra*.

25. In order to provide Hye Crest with a sufficient opportunity to succeed in its attempt to develop a competitive video service, we will also grant its remaining requests for regular (i.e., non-developmental) authority, non-common carrier status and a designated service area. Developmental authority is not appropriate for Hye Crest, which has conducted technical tests for two years and is now seeking authority for commercial application of its service. *See* 47 C.F.R. §§ 21.400, 21.401. Furthermore, as Hye Crest points out, regular authority is necessary to ensure the public continued service, to permit it to amortize its construction costs and start-up expenses sufficiently to lower subscription rates to competitive levels, and to attract the amount of venture capital needed to cover the system's construction and initial operation costs. Under these circumstances, developmental authority would be inappropriate.

26. Furthermore, the proposal will be only one of several video services available to consumers in the New York City area. Hye Crest will not hold itself out as serving all customers indiscriminately; nor do we find a public interest need to require that it comply with the obligations attendant to common carrier operation, such as circuit growth projections and orders for service. 47 C.F.R. § 21.706(a)(3). Accordingly, Hye Crest's request to provide service as a non-common carrier, and thereby rely upon the marketplace rather than direct Commission regulation to dictate the terms and conditions of its video service offerings, is consistent with precedent. *See* NARUC v. *FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). *Multipoint Distribution Service*, 2 FCC Rcd 4251 (1987) and *Domestic Fixed - Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

27. Finally, we will license Hye Crest to provide service throughout the proposed designated service area, the New York PMSA. This designated service area licensing scheme is consistent with that allowed in the Digital Electronic Message Service (DEMS) and in the Cellular Radio Telecommunications Service. In view of the propagation characteristics of the 28 GHz frequency band, only a designated service area licensing scheme will provide the licensee with the necessary flexibility to select and timely establish antenna locations to facilitate efficient frequency re-use, and thereby, assure continuous signal coverage.

28. In summary, we grant Hye Crest's proposal to construct a 24 channel video distribution system comprised of multiple, low power transmitters. Each station will provide service through transmitters within a 6 to 8 mile cell and be capable of offering discreet programming within its individual service area. We believe that Hye Crest's proposal is imaginative, technically feasible, and consistent with the statutory mandate of Section 7 of the Communications Act, which charges the Commission to encourage the provision of new technologies and service to the public. However, there is no guarantee of success for Hye Crest's proposal[17], and we are concerned that licensed spectrum not remain unused. Consequently, in order to ensure that the spectrum licensed to Hye Crest is utilized fully, we have concluded that Hye Crest's authorization requires the imposition of certain conditions. Specifically, Hye Crest will be issued an authorization to construct the Brighton Beach facility within 12 months. Upon completion of construction of the facility, Hye Crest must file with the Commission a "Certification of Construction Completion" (FCC Form 494A) certifying that the facility has been constructed within the maximum 12 month construction period and that the station is ready to operate. Furthermore, because Hye Crest will operate its system as a non-common carrier, we expect that at the time the Form 494A is filed it shall commence its provision of video service to customers. Failure to timely file the certification of construction completion will subject the authorization to the automatic forfeiture provisions of Section 21.44 of the Commission's Rules, 47 C.F.R. § 21.44.

29. Given the unique nature of Hye Crest's proposal, and our stated concern with spectrum utilization, we will exercise our descretion to limit the term of the license to 5 years rather than authorizing a full 10 year term.[18] After construction of the initial Brighton Beach station, Hye Crest may file applications to add additional transmitter stations within its designated service area for the duration of the 5 year license term by filing an "Application for a New and Modified Microwave Radio Station License" (FCC Form 494), for each additional transmitter station. Each application will be subject to the 30-day notice period. During that time, all interested parties will have an opportunity to file objections to the additional transmitter application. However, no competing applications may be filed for the additional transmitting facilities.[19] If authorized, each additional transmitter must be constructed within a maximum period of 12 months and its license term shall not exceed that of the Brighton Beach facility. This authorization is also subject to the Commission's discontinuance and reduction of service procedures set forth in Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303.

30. Accordingly, IT IS ORDERED, that the objections filed by the Commenters ARE DENIED.

31. IT IS FURTHER ORDERED, that the captioned application and attendant waiver request filed by Hye Crest Management, Inc. ARE GRANTED consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We note that SMSAs were eliminated by the Office of Management and Budget, effective June 30, 1983. The New York Primary Metropolitan Statistical Area ("PMSA") is the successor to the New York SMSA.

[2] Congressman Rinaldo by letter informally supported the proposal. Microband filed untimely informal objections which have been considered but will not be specifically discussed. *See* 47 C.F.R. § 21.30.

[3] Under this concept a carrier has the freedom to select multiple transmitter sites within the boundaries of a particular statistical area. *See* 47 C.F.R. § 21.500.

[4] Each cell is served by a single station, apparently using multiple transmitters, which will transmit at an output power level of 5 watts per channel with an omni-directional antenna at either vertical or horizontal polarization.

[5] In support of its request, Hye Crest cites Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982) and Multipoint Distribution Services, 2 FCC Rcd. 4251 (1987).

[6] Initially, Hye Crest also requested a waiver of Section 21.120 of the Rules, to enable it to employ temporarily non-type accepted equipment. This request was subsequently withdrawn because the equipment was granted an equipment authorization (FCC ID: HVFJA1).

[7] 47 C.F.R. § 21.706(a)(3).

[8] Hye Crest says it will couple its 24 programmed channels with 12 off-the-air (VHF and UHF) broadcast channels provided via rooftop or master antenna system and reception equipment of each subscriber.

[9] The below 13.25 GHz frequencies include the 2.6 GHz band which has been allocated primarily for MDS and Instructional Television Fixed Service ("ITFS"). These frequencies are widely used in the New York City area.

[10] Licenses for stations in the Point-to-Point Microwave Radio Service are generally issued for a term of 10 years. *See* 47 C.F.R. § 21.45.

[11] In Nevada Bell, 3 FCC Rcd 7217 (1988), for example, a waiver was granted to Nevada Bell to use frequencies allocated to the Instructional Television Fixed Service ("ITFS") for the provision of basic telephone service to its subscribers. To date, we have received only three other similar waiver requests, one of which was denied for failure to demonstrate a lack of harm to the band's assigned users (Leaco Rural Telephone Cooperative, Inc., 4 FCC Rcd 5341 (1989)); the second was withdrawn (Applications of The Rye Telephone Company (File Nos. 1660-CF-P-89 through 1683-CF-P-89) dismissed January 26, 1990); and the third is pending (Applications of Nevada Bell to add seven stations to its system. File Nos. 7486-CF-P-90 through 7492-CF-P-90).

[12] Big Bend Telephone Company, Inc., *supra*. Tele-Media Company of Key West, 74 FCC 2d 554 (1979). *See also* Bangor and Aroostook Railroad Company, 5 FCC Rcd 1199 (1990); Satellite Television Service, Inc., 87 FCC 2d 598 (1981); American Microlert, Inc., 77 FCC 2d 183 (1980); Television Enterprises, Inc., 68 FCC 2d 1268 (1978); and Teleprompter of Ukiah, 68 FCC 2d 866 (1978).

[13] The 28 GHz band was made available for point-to-point use in 1959, and since that time, little use of the band has been made.

[14] In addition to the 28 GHz band the remaining frequency bands are: 17.7 - 19.7 GHz; 21.2 - 23.6 GHz; 31.0 - 31.3 GHz; and 38.6 - 40.0 GHz. Taken together, the five bands total 8.1 GHz of available spectrum.

[15] The Commission consistently has found such competition and diversity is desirable. *See, e.g.*, Notice of Proposed Rule Making and Notice of Inquiry ("Wireless Cable"), 5 FCC Rcd 971 (1990); Report and Order, *id.*, 5 FCC Rcd 6410 (1990); Notice of Inquiry in MM Docket No. 89-600 ("Cable Television Inquiry"), 5 FCC Rcd 362 (1989); Report in MM Docket No. 89-600 ("Cable Television Report"), FCC 90-276 (released July 31, 1990).

[16] In reaching this decision, we also find Hye Crest's requested waiver meets the standard set forth in WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), wherein the court held that in judging a request for waiver, the Commission must determine whether such grant would serve the public interest and whether grant would undermine the policy which the rule is intended to serve. As discussed above, the requested waiver would serve the public interest. Moreover, Section 21.108 is intended to ensure sufficient spectrum availability for fixed common carrier microwave operations (other than temporary fixed stations, Multipoint Distribution Service stations, and Digital Termination Service nodal stations) operating at frequencies of 2,500 MHz or higher. Hye Crest has demonstrated that there is no current or reasonably foreseeable use of the 28 GHz band by its assigned users. Therefore, our action in granting Hye Crest's request will not undermine the policy Section 21.108 is intended to serve. *See also* 47 C.F.R. §§ 1.3, 21.19.

[17] As NYNEX points out, Hye Crest may be able to offer service to only a small percentage of the households in the New York PMSA. Even with such a small percentage, we believe there is a sufficient likelihood that the service will be successful to justify waiver.

[18] 47 C.F.R. § 21.45(b).

[19] Similar treatment was accorded to DEMS nodal stations in a designated service area. *See* Revision of Part 21 of the Commission's Rules (CC Docket No. 86-128), 2 FCC Rcd 5713 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-100

In the Matter of

Amendment of the Amateur Service Rules to Relocate the Novice and Technician Operator Class Frequency Segment within the Amateur Service 80 Meter Band. RM-6594

REPORT AND ORDER

Adopted: January 4, 1991; Released: January 18, 1991

By the Commission:

I. INTRODUCTION

1. On February 26, 1990, we adopted a *Notice of Proposed Rule Making (Notice)* [1] in the above-captioned proceeding. In the *Notice*, we proposed to relocate Novice and Technician Operator Class control operator frequency privileges in the 80 meter (m) amateur service band from the 50 kHz segment at 3700-3750 kHz to the segment at 3675-3725 kHz.[2] We proposed the relocation of the segment (80 m Novice segment) with the objective of relieving interference. This *Report and Order* adopts the relocation as proposed.

II. BACKGROUND

2. Sections 97.301(e) and 97.307(f)(9) of the Commission's Rules, 47 C.F.R. §§ 97.301(e) and 97.307(f)(9), authorize an amateur station having a control operator holding a Novice or Technician Operator Class license to transmit telegraphy on the 80 m Novice segment. The Novice segments generally are intended for beginning amateur radiotelegraphers to gain actual experience in sending and receiving telegraphy messages. [3] In Canada, however, the frequencies in the upper half of the 80 m Novice segment are used by amateur stations for telephony transmissions. Thus, mutual interference in the 3725-3750 kHz segment can occur when a United States station, especially one located in a northern state, transmits telegraphy on the same channel and at the same time as a Canadian station transmits telephony. The proposal to move the 80 m Novice segment to 3675-3725 kHz was offered as a solution to this mutual interference problem. Four supporting comments and one opposing comment to the proposal were filed.[4]

3. Bruce Balog and Mark Widrick support the proposal,[5] as does Philip Galasso.[6] Although the ARRL states that the proposal has merit, it suggests that the 80 m Novice segment be expanded by 25 kHz to 3675-3750 kHz. The ARRL notes that the principal means that Technician Class licensees have for upgrading to General Class operator licenses is by increasing their proficiency in telegraphy skills, and the high frequency Novice segments are an important element in this process. To compensate General, Advanced, or Amateur Extra Class Operators for the loss of exclusive use of the suggested expansion frequencies, ARRL requests that those stations be authorized high power transmissions in the 80 m Novice segment.[7]

4. Robert A. Scupp opposes moving the 80 m Novice segment. He believes that such a move may be premature in light of a proposal in Canada to allow the amateur community to determine its own emission type subbands. He suggests that, if the proposal is finalized, the Canadian amateur service community could expand its telephony segment, thus causing an increase in the interference potential between Canadian and United States amateur stations.[8] The ARRL also notes that the pending Canadian proposal to deregulate the amateur service emission types may lead to the development of different operating patterns.[9]

III. DISCUSSION

5. The high frequency Novice segments provide beginning amateur radiotelegraphers with an opportunity to polish their skills at slow speed before they engage in communicating with higher speed operators. We agree with ARRL that this experience provides training that can be valuable to a person preparing to upgrade to a higher class of operator license. The comments confirm that mutual interference occurs in at least a part of the 80 m Novice segment. Mr. Galasso characterizes such interference as intolerable. Mr. Widrick observes that only half of the 80 m Novice segment is usable because of the interference. In light of these comments, we believe that some relief should be afforded Novice and Technician Class licensees using frequencies in the 80 m Novice segment. Beginning radiotelegraphers are much less able to cope with such interference than are veteran operators. If interference increases as a result of the implementation of the Canadian deregulatory proposals mentioned by both Mr. Scupp and ARRL, we can evaluate the situation at that time and propose whatever adjustments are needed.

6. In addition to our proposal to move the 80 m Novice segment 25 kHz down the band, we have considered the suggestion made by ARRL to expand the segment by 25 kHz. Under the ARRL approach, however, stations having Novice and Technician Class control operators would have to share the entire enlarged 80 m Novice segment, 3675-3750 kHz, with United States amateur stations[10] that transmit emission types CW, RTTY, and data using higher power.[11] They would also have to continue to share the 3725-3750 kHz segment with the Canadian telephony stations.[12] Although the Novice and Technician Class operators would have access to a larger frequency segment in the 80 m band, they would have to share it with large numbers of United States stations transmitting with much higher power. Rather than less interference to stations operated by Novice and Technician Class operators, it is likely that there would be more. Because such an outcome is directly contrary to our objective, we decline to adopt ARRL's suggestion.

IV. CONCLUSION

7. We will adopt the rule change proposed in the *Notice* to relocate the 80 m Novice segment to 3675-3725 kHz.[13] This rule change will serve to reduce the amount of mutual interference between United States amateur stations and Canadian amateur stations. In addition, it will provide Novice and Technician Class control operators with more opportunities to improve their telegraphy skills.

V. PAPERWORK REDUCTION ACT

8. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501-3520, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

VI. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that effective **March 16, 1991,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth in the Appendix below. Authority for this action is found in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c) and (r).

10. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority: 48 Stat. 1 066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. The line entry for the 80 meter band in the table in Section 97.301(e) is revised to read as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(e) * * *

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing Requirements. See § 97.303, (Paragraph)
HF	**MHz**	**MHz**	**MHz**	
80 m	3.675-3.725	3.675-3.725	3.675-3.725	(a)

* * * * *

3. Section 97.313(c)(1) is revised to read as follows:

§ 97.313 Transmitter power standards.

* * * * *

(c) * * *

(1) The 3.675-3.725 MHz, 7.10-7.15 MHz, 10.10-10.15 MHz, and 21.1-21.2 MHz segments;

* * * * *

FOOTNOTES

[1] 5 FCC Rcd 1276 (1990).

[2] The full 80 m amateur service band is 3500-3750 kHz. Its propagation characteristics facilitate communications over paths of several hundred miles. During the hours of darkness, worldwide contacts are possible. The higher classes of amateur operator license are authorized more extensive privileges in the 80 m band. They also share the frequencies of the Novice and Technician Class operators.

[3] In addition to the 80 m Novice segment, there are also Novice telegraphy segments in the 40, 15, and 10 m bands.

[4] The commenters are: Bruce Balog, Philip E. Galasso, Robert Scupp, The American Radio Relay League, Inc. (ARRL), and Mark Widrick.

[5] Comments of Bruce Balog at 1 and comments of Mark Widrick at 1.

[6] Comments of Philip E. Galasso at 1 and 2. Mr. Galasso also suggests that Amateur Extra Class control operators be authorized additional emission privileges. His suggestion is outside the scope of this proceeding.

[7] Comments of ARRL at 3. While amateur stations having Technician, General, Advanced or Amateur Extra Class control operators may generally transmit with a transmitter power not exceeding 1500 watts, no station may transmit with a transmitter power exceeding 200 watts in the 80, 40, and 15 m band Novice segments. *See* Section 97.313 of the Commission's Rules, 47 C.F.R. § 97.313.

[8] Comments of Robert A. Scupp at 1-4.

[9] Comments of ARRL at 3.

[10] As of June 1, 1990, there were 191,410 Novice and Technician Class licensees and 260,468 higher class licensees.

[11] *See* Section 97.3(c) of the Commission's Rules, 47 C.F.R. § 97.3(c), for the numerous specific emission types covered by these terms. In general, they include various international Morse code telegraphy emission types, telemetry, telecommand and computer communications emission types, and narrow-band direct printing telegraphy emission types.

[12] *Callbook Magazine* indicates there are 27,322 amateur operators in Canada.

[13] The appendix to the *Notice* only proposed to revise Section 97.301. The 80 m Novice segment, however, is also listed in Section 97.313. Consequently, the attached appendix also revises this rule section.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-536

In the Matter of

Augusta Radio Fellowship Institute d/b/a SOUTH CAROLINA RADIO FELLOWSHIP — File No. BPED-871008MS

For Construction Permit for a New FM Broadcast Station on Channel 231A at Kingstree, South Carolina

In the Matter of

WILLIAMSBURG COUNTY BROADCASTING CORP.
Licensee of Station WKSP(AM)
Kingstree, South Carolina

Order to Show Cause Why the License for Station WKSP(AM), Kingstree, South Carolina, Should Not Be Revoked

Appearances

Allyn Knop and *Linda L. Knop*, pro se, on behalf of Williamsburg County Broadcasting Corp.; *Gary P. Schonman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: January 8, 1991; Released: January 18, 1991

PRELIMINARY STATEMENT

1. By *Order to Show Cause and Order Requiring Consolidation*, FCC 90-181 (released May 8, 1990) (*Show Cause Order*), at ¶ 19, the Commission directed Williamsburg County Broadcasting Corp. (County), licensee of Station WKSP(AM), Kingstree, South Carolina, to show cause why the license for WKSP(AM) should not be revoked, based upon findings to be made upon the following issues:

(a) whether County misrepresented facts or was lacking in candor in its application for a new FM station at Kingstree, South Carolina (File No. BPH-871008MC), in failing to provide full disclosure of the felony charges pending against Gregory Knop.

(b) whether County violated Section 1.65 of the rules by failing to report the felony conviction of Gregory Knop and changes in the composition of the applicant.

(c) whether, in light of the felony drug trafficking conviction of Gregory Knop and the evidence adduced under (a) and (b) above, County is qualified to remain the licensee of Station WKSP(AM).

2. The *Show Cause Order*, at ¶ 20, ordered that the WKSP(AM) revocation proceeding be consolidated with the ongoing proceeding in MM Docket No. 88-536 for a construction permit for a new FM station on Channel 231A at Kingstree, South Carolina, in which County was, at that time, one of two mutually exclusive applicants.[1]

3. The *Show Cause Order*, at ¶ 21, placed the burden of proceeding with the introduction of evidence and the burden of proof with respect to the above issues on the Bureau. Additionally, the *Show Cause Order*, at ¶ 22, ordered that the evidentiary record developed in the FM proceeding may be considered as part of the evidentiary record in the revocation proceeding. The *Show Cause Order*, at ¶ 23, also ordered that County have the opportunity to present relevant evidence in mitigation of revocation of its license for WKSP(AM).

4. The issues specified against County in the *Show Cause Order* are, with the exception of references to County principal Allyn Knop, substantively identical to those that were added by the Presiding Judge against County in the FM proceeding.[2] In its *Show Cause Order*, the Commission held that Gregory Knop's felony drug trafficking conviction raises a serious question as to County's fitness to remain a licensee. The Commission further held that the issues specified in the FM proceeding concerning misrepresentation, lack of candor, and violation of reporting requirements are also relevant to County's qualifications as licensee of WKSP(AM). ¶ 18.

5. Hearings on the issues specified in the FM proceeding were held on June 27, 1989, through June 29, 1989, and on July 3, 1989. On September 27, 1989, the Bureau filed Proposed Findings of Fact and Conclusions of Law with respect to the issues specified against County in the FM proceeding. County also filed Proposed Findings. In addition, the Bureau and County filed Replies on October 11, 1989. At a prehearing conference in the revocation proceeding on May 18, 1990, the Bureau represented that it would meet its burdens by relying on the existing evidentiary record developed in the FM proceeding (Tr. 765). The Bureau affirmed this at a further prehearing conference on June 25, 1990 (Tr. 785).

6. By *Memorandum Opinion and Order*, FCC 90M-2878 (released September 12, 1990), the Presiding Judge established October 9, 1990, as the deadline for County to file a statement in writing whether it intended to present evidence in mitigation of revocation of its license for WKSP(AM). By *Order*, FCC 90M-3244 (released October 16, 1990), citing County's failure to file a written statement on its intention, the Presiding Judge closed the record in the revocation proceeding and established a procedural schedule for the filing of Proposed Findings of Fact and Conclusions of Law as well as replies thereto. The Bureau filed Findings on November 1, 1990. County did not file Findings.

FINDINGS OF FACT

BACKGROUND

7. County is a family-operated, for-profit corporation formed under the laws of the State of South Carolina (County Ex. 2). It is the licensee of Station WKSP(AM), Kingstree, South Carolina, a daytime-only facility (County Ex. 2). County purchased WKSP(AM) in 1979 (Tr. 107). At that time, Gregory Knop and his father, Kenneth Knop, were equal (50%) voting shareholders in the company (Tr. 107). Gregory Knop was President and a Director; Kenneth Knop was Secretary-Treasurer and a Director; Gregory Knop's wife, Linda Knop, was a Director; and Kenneth Knop's wife, Mildred Knop, also was a Director.

8. Several ownership changes were subsequently effected. In an Ownership Report, filed in July 1981, County reported that Linda Knop had replaced Kenneth Knop as Secretary-Treasurer (Tr. 152). In June 1987, Gregory Knop took positive control of County by acquiring an additional 1% of the voting stock from his father (Tr. 155-156). Later in 1987,[3] Kenneth and Mildred Knop resigned as Director, and Kenneth Knop relinquished his 49% ownership interest in County. At the same time, Gregory Knop's brother, Allyn Knop, and Allyn Knop's wife, Joan Knop, as tenants in the entireties, acquired a 49% ownership interest in County in the form of nonvoting shares; Gregory Knop increased his voting interest from 51% to 100% (Tr. 109, 186, 412).

GREGORY KNOP'S FELONY DRUG CONVICTION

9. Gregory Knop was arrested on drug trafficking charges on August 7, 1987, by agents of the Federal Drug Enforcement Agency. The federal indictment handed up against Gregory Knop contained six counts, each of which carried a maximum sentence of 20 years imprisonment and a $1,000,000 fine (Tr. 529; County Ex. 11, pp. 1-4).

10. On November 2, 1987 (after County had filed its application), pursuant to a plea bargain with federal prosecutors (Tr. 529), Gregory Knop pleaded guilty in United States District Court for the District of South Carolina, Florence Division, to one count of violating 21 U.S.C. Sections 841(a)(1), 841(b)(1)(A)(ii), and 846 (conspiracy to possess with intent to distribute and distribute cocaine) (County Ex. 10, p. 1). The remaining five counts, involving alleged possession and distribution of cocaine, were dropped as part of the plea bargain agreement (Tr. 530-531). Gregory Knop was sentenced on January 25, 1988, to five years imprisonment and ordered to pay a special assessment of $50 (County Ex. 10, p. 1). On March 21, 1988, Gregory Knop reported to Federal Prison Camp, Maxwell Air Force Base, Montgomery, Alabama (County Ex. 10, p. 1). At the time of the hearing in this proceeding, he was still incarcerated (Tr. 506).

11. Gregory Knop asserted he began trafficking in cocaine because WKSP(AM) was having financial difficulties (Tr. 564-567). WKSP(AM) experienced financial problems from the time County purchased the station in 1979 (Tr. 559). By early 1987 the problems at WKSP(AM) were continuing to escalate (Tr. 560). Although Gregory Knop was able to obtain a $10,000 loan for WKSP(AM) in early 1987 from the Exchange Bank in Kingstree, the daytime-only station remained financially strapped (Tr. 562-563). Gregory Knop decided to sell drugs to make money for his living expenses so that he would not have to take money out of the corporation for such purposes (Tr. 565). Gregory Knop also described himself as desperate to avoid being further obligated to his parents who had "foot[ed] the bill [for WKSP(AM)] since May of 1980" (Tr. 623).

12. Gregory Knop's testimony about obtaining a loan for WKSP(AM) from the Exchange Bank contradicted representations he made in a letter-petition to a federal judge requesting a reduction in the length of his prison sentence. Thus, writing from prison, in a letter, dated August 29, 1988, to United States District Judge Clyde Hamilton, Gregory Knop claimed that he turned to selling drugs only as a last resort after having been denied a loan from the Exchange Bank:

> In an effort to obtain local financial help, I approached Mr. Bobby Harrell at the Exchange Bank, Kingstree, and was told that they didn't know me. I had banked there for a number of years. This was the attitude toward outsiders. We want your money, but go away when you need them. Desperate not to lose everything that my family had worked for and had invested in, I resorted to foolish involvement into an area which I would not have considered under normal conditions. I had been introduced to local people boasting of to me about the large amount of cash that they had obtained by selling drugs to all types. The rest is history, except to say that desperate people do desperate things (Tr. 604).

13. When confronted with the apparent discrepancy in his testimony, Gregory Knop conceded that he had intentionally been less than candid in his letter to Judge Hamilton in order to bolster his chances of getting an early release from prison (Tr. 709-710).

14. Gregory Knop claimed that as a broadcaster he felt he had a special responsibility to be a good, substantial individual in the community (Tr. 567-568). Although he said it occurred to him that becoming involved in illegal drugs might have an impact on this special responsibility, he "didn't give it much thought . . . ." (Tr. 568). Gregory Knop considered illegal drugs as an option because he needed financial help, and it was "the easiest thing to grasp at at the time" (Tr. 566).

15. Gregory Knop became involved in drug trafficking after being introduced to an individual by the name of Marion Nelson Kinard (Kindard) (Tr. 671). Gregory Knop and Kinard entered into a joint venture in which Gregory Knop was to finance the purchase of cocaine for sale to Kinard's customers (Tr. 672-675). However, when asked why Kinard would have wanted him as a partner when he had no money to invest in the venture, Gregory Knop initially was less than candid in his responses. At first, Gregory Knop testified that Kinard may have wanted him as a partner because Kinard believed that he had information as to when there were going to be police raids. Gregory Knop claimed that Kinard's assessment of him in this regard was inaccurate (Tr. 690-691). However, Gregory Knop subsequently admitted that he indeed had access to inside information about upcoming police drug raids (Tr. 691) and that the information was leaked to him by an unnamed official in the Kingstree Police Department or the Williamsburg County Sheriff's Office (Tr. 712). Based on the information provided to him, Gregory Knop alerted Kinard in advance of two such raids (Tr. 693), the

result of which was that Kinard avoided arrest on both occasions (Tr. 713). Gregory Knop personally "reimbursed" the law enforcement official for the tips (Tr. 713).

16. Gregory Knop claimed that he never sold drugs to, or bought drugs from, any shareholders, directors, or officers of County (Tr. 582). The record is less clear with respect to whether Gregory Knop engaged in illegal drug activities with those who worked at WKSP(AM). Linda Knop testified that an individual by the name of Steve Richburg (Richburg) worked at WKSP(AM). His specific duties involved inserting commercial spots during breaks in the station's satellite music network transmission (Tr. 128-129). According to Linda Knop, Gregory Knop hired Richburg and then fired him after a month or two because his services were no longer needed (Tr. 129-130). In contrast to his wife's testimony, Gregory Knop maintained that Richburg never worked at WKSP(AM), but only hung around the radio station because he was helping him construct a liquor store nearby (Tr. 607-608). Gregory Knop also identified Richburg as an individual who, "for a while, did some [debt] collecting for me and for the scuba shop in Myrtle Beach, that I was partners with, plus other debts that were owed to me around the area" (Tr. 600). Gregory Knop claimed that he fired Richburg because he learned that Richburg was involved in illegal drugs and was bringing undesirable people to the radio station. These people rode motorcycles, had tatoos on their arms, and looked like they were mean (Tr. 614-616). Despite his claimed disdain for Richburg because of Richburg's involvement in drugs, Gregory Knop admitted purchasing a quantity of marijuana from Richburg before firing him (Tr. 617, 619). Gregory Knop said he bought the marijuana for his own consumption, but decided not to use it and threw it away (Tr. 618).

17. Although Gregory Knop testified that he did not deal drugs from WKSP(AM) (Tr. 583), he later admitted that on at least one occasion he used the radio station as a location where drug customers would meet him and then go elsewhere to execute a drug sale (Tr. 592). Also, drug users frequently called Gregory Knop at WKSP(AM) because he and Kinard gave them the radio station's telephone number[4] (Tr. 588). Gregory Knop claimed, however, that he did not place any telephone calls from WKSP(AM) regarding drug related business because he didn't want to involve the radio station in such activity (Tr. 589).

18. Gregory Knop was involved in drug trafficking for approximately eight or nine months before he was arrested (Tr. 573). During that period of time, Gregory Knop claimed that he sold a total of only three ounces of cocaine and made a total profit of only about $300 (Tr. 573-574).

19. On October 8, 1987, while felony drug charges were still pending against Gregory Knop, County filed its application for a construction permit for a new FM broadcast station in Kingstree. County represented in its application that Gregory Knop held 100% of the voting stock and was County's President and a Director (Tr. 508); Linda Knop was County's Secretary-Treasurer (Tr. 65, 151) and also a Director (Tr. 150); and Allyn Knop held a nonvoting equity interest (Tr. 187-188).

MISREPRESENTATION/LACK OF CANDOR ISSUE

20. The application (FCC Form 301), at Section II, Page 4 (Citizenship and Other Statutory Requirements), Item 10(b) inquired whether there was then pending in a court or administrative body a proceeding against the applicant or any party to the application involving "any felony; broadcast related antitrust or unfair competition; criminal fraud or fraud before another governmental unit; or discrimination" (County Ex. 5, p. 1). An affirmative response to Item 10(b) required the applicant to submit an exhibit giving full disclosure concerning:

> persons and matters involved, including an identification of the court or administrative body and the proceeding (by dates and file numbers), a statement of the facts upon which the proceeding is or was based or the nature of the offense alleged or committed, and a description of the current status or disposition of the matter (County Ex. 5, p. 1).

21. County responded "yes" to Item 10(b) (County Ex. 5, p. 1) and provided an accompanying exhibit which stated in its entirety:

> There is now pending in Federal Court a felony charge against Gregory A. Knop. The matters at issue are non-broadcast related and do not fall within the Commission's area of concern as expressed in its Policy Statement on Character Issues. Complete details will be provided to the Commission upon request (County Ex. 5, p. 2).

The exhibit did not provid any of the forementioned details about Gregory Knop's criminal activities required by the application (County Ex. 5, p. 2; Tr. 521-522).

22. Gregory Knop testified that he did not know the basis for his belief that details of a drug arrest did not have to be disclosed to the Commission (Tr. 522-523). However, it appears that Gregory Knop based this belief on his discussions with County's communications counsel, Jerrold Miller (Miller) (Tr. 539-540, 630). Although Gregory Knop initially said he spoke with Miller "at length" about how to respond to Item 10(b), he later testified, "I don't think that that was an area that we dwelled on either" (Tr. 516, 626). In any case, Gregory Knop claimed to have difficulty remembering details of his discussions with Miller about how to respond to Item 10(b) (Tr. 520, 523, 547).

23. Miller, however, recalled that Gregory Knop telephoned him in August 1987 shortly after his arrest to find out what effect the arrest would have on County's chances of being awarded the FM construction permit (Jt. Stip. 1, p. 1-2). Based on Miller's interpretation of the *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986) (*Character Policy Statement*), Miller advised Gregory Knop that, "a drug arrest and possible conviction would have no impact on the possibility of obtaining the FM license because it was outside the scope of what the Commission had said its concerns were" (Jt. Stip. 1, p. 2). It was Miller's view that FCC Form 301 "had in effect been modified" by the *Character Policy Statement* (Jt. Stip. 1, p. 8).

24. When the time came to prepare County's FM application, Miller first sent Gregory Knop a blank FCC Form 301, "so he would be familiar with it" (Jt. Stip. 1, p. 2). Thereafter, Miller and Gregory Knop, by telephone, together went over the application, question-by-question (Jt. Stip. 1, p. 3). According to Miller, when they reached Item 10(b) of the application, wherein details of the arrest and pending charges were required to be disclosed:

> Greg said he was really embarrassed about this; something he was not the least bit proud of. "Do I absolutely have to give all the facts on the form because, as we discussed, it is not something the Commission is interested in." (I am just paraphrasing here). I answered, "inasmuch as this is not a matter of concern to the Commission, I don't think it is improper to state this was a non-broadcast related felony you have been charged with, but I do think you should indicate strongly that you would want to give the details of it in an exhibit to the Commission if there was indication they wanted such." And he said, "of course he would if the Commission insisted upon it, just that it was a point of embarrassment to him to have it in the public file where people could see it." So I said, "okay, we will prepare the following exhibit," provided the answers which were in the application that we completed and sent down for your review to sign (Jt. Stip. 1, p. 4).

25. Even though Gregory Knop already had been subjected to intense public scrutiny because of his drug arrest (I had made every newspaper in the State of South Carolina) (Tr. 537), it was Miller's belief that the basis for Gregory Knop's claim of embarrassment had to do with "someone seeing his application at the Commission files and seeing details of it. He just felt embarrassed for . . . this to be put down and stay in a permanent file in Washington" (Jt. Stip. 1, p. 5).

26. After this discussion with Gregory Knop, Miller drafted the text of the exhibit to Item 10(b) (Jt. Stip. 1, p. 4). The completed application, including the exhibit to Item 10(b), ultimately was sent by Miller to Gregory Knop for final review, signature, and subsequent filing (Jt. Stip. 1, p. 4). Miller believed the Commission would not ask County for additional information about Gregory Knop's criminal activities, and he expressed that belief to Gregory Knop (Jt. Stip. 1, p. 8). Gregory Knop, however, denied there were any such discussions with Miller about the likelihood of the Commission requiring further details (Tr. 651).

SECTION 1.65 ISSUE

FAILURE TO REPORT DRUG CONVICTION

27. County first revealed details of Gregory Knop's criminal activities, including his conviction and sentence, in an amendment filed January 14, 1989, fourteen months after he pleaded guilty to trafficking in drugs. The amendment was in response to a specific request in the *HDO* for information about the felony charges referred to in County's exhibit to Item 10(b) of its application (Tr. 138-139).

28. Miller and Gregory Knop had fairly regular telephone conversations up until the time that Gregory Knop reported to federal prison on March 21, 1988 (Jt. Stip. 1, p. 9). Nevertheless, neither Gregory Knop nor anyone else associated with County advised Miller that Gregory Knop had been convicted until early or mid February 1988 (Jt. Stip. 1, p. 9). Even then, the conviction was not reported to the Commission in the FM proceeding because, according to Miller:

> I totally forgot about that there was another question on [FCC Form 301]. I knew [Gregory Knop] had disclosed he had been arrested, and I just forgot there was a question on convictions. It didn't come up at all. We just didn't go back over the form at that time . . . it was totally inadvertent (Jt. Stip. 1, pp. 9-10).

29. Although County did not reveal details in its FM application about the criminal activities of Gregory Knop, it did provide a reference to such matters in an exhibit to its application for renewal of license of WKSP(AM), filed on July 27, 1988. In the exhibit to its AM renewal application, County stated:

> Mr. Gregory Knop, in early 1988,[5] and Mr. Allyn Knop, in August 1984, were convicted of a non-broadcasting felony, if more information is needed, it will be furnished upon request (County Ex. 14, p. 2).

FAILURE TO REPORT OWNERSHIP CHANGES

30. On April 15, 1988 (shortly after Gregory Knop had reported to prison), Allyn and Joan Knop's 49% nonvoting interest was converted to a voting interest, and Gregory Knop's 100% voting interest was reduced to a 51% voting interest; Allyn Knop became Vice President; and Joan Knop became Secretary-Treasurer of County (Tr. 185). County first revealed these ownership changes eight months later in a January 4, 1989, amendment to its FM application.

31. Miller could not provide any reason why County did not timely report the April 15, 1988, ownership changes in this proceeding, even though the changes had been reported in an Ownership Report, filed with the Commission in June 1988 (Jt. Stip. 1, p. 13). Miller again attributed County's failure to inadvertence (Jt. Stip. 1, p. 13). Allyn Knop was unable to explain why, on April 15, 1988, his 49% nonvoting interest in County was converted to a voting interest (Tr. 320-321). He denied, however, that the fact that Gregory Knop had reported to federal prison just three weeks earlier to begin serving a lengthy prison sentence had anything to do with the decision to make Allyn Knop a voting shareholder (Tr. 322-325).

CONCLUSIONS

DRUG CONVICTION ISSUE

32. The *Character Policy Statement* "affords guidance as to the kinds of 'non-FCC offenses'" not involving dishonesty that might be deemed material to character qualifications." *Show Cause Order* at ¶ 13. The *Character Policy Statement* lists certain categories of non-FCC misconduct which it deems pertinent to an evaluation of an

applicant's character qualifications. However the Commission's *Policy Statement* also makes clear that there may be circumstances in which an applicant has engaged in other nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation. 102 FCC 2d at n. 60. According to the *Character Policy Statement*, "[s]uch misconduct might, of its own nature, constitute prima facie evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body." *Id.*

33. Gregory Knop's conviction for drug trafficking falls "within the category of 'egregious' non-FCC offences entailing such callous disregard for the welfare of fellow citizens as to place at issue the perpetrator's qualifications to be or remain a broadcaster." *Show Cause Order*, at ¶ 14. This conclusion is further buttressed by *Public Notice*, 4 FCC Rcd 7533 (1989), in which the Commission clarified its policies regarding licensee participation in drug trafficking. Noting that drug trafficking "is a matter of the gravest concern," the Commission stated its intention to take all appropriate steps, including initiation of license revocation proceedings, where information comes to its attention that FCC licensees or their principals have been convicted of drug trafficking. The Commission unequivocally stated that "drug trafficking convictions fall within the scope of conduct the Commission may consider under existing policy in the broadcast area" (footnote omitted). *Id.* Although afforded an opportunity, County did not offer any evidence by way of mitigation for Knop's misconduct. Considering the recency of Knop's drug trafficking conviction and the "egregious" nature of the non-FCC offence involved here, revocation of County's license for station WKSP(AM) is mandated.

34. In addition, there are separate and independent grounds for revocation of County's license. The findings adduced under the misrepresentation and Section 1.65 issues also justify this sanction.

MISREPRESENTATION/LACK OF CANDOR ISSUE

35. Issue (a) calls for a determination whether County misrepresented facts or was lacking in candor in failing to provide full disclosure of the felony charges pending against Gregory Knop. The Commission has held that misrepresentation involves false statements of fact, while lack of candor involves concealment, evasion, and other failures to be fully informative. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Since lack of candor, like misrepresentation, represents a form of deceit, there can be no lack of candor unless there is shown to be an intent to deceive. *Id. See* also *Riverside Broadcasting Co., Inc.*, 104 FCC 2d 644 (1986). Lack of candor may result in the disqualification of applicants and the denial of applications for broadcast licenses. *See Las Americas Communications, Inc.*, 1 FCC Rcd 786, 790- 791 (Rev. Bd. 1986); *Mid - Ohio Communications, Inc.*, 104 FCC 1d 572, 589-599 (Rev. Bd. 1986); *Washington's Christian Television Outreach*, 99 FCC 2d 395, 400-401 (Rev. Bd. 1984), *modified on other grounds*, 59 RR 2d 787 (1985), *recon. denied*, 59 RR 2d 1679 (1986, *aff'd by judgment*, No. 85-1649 (D.C. Cir. Dec. 17, 1987); *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719-723 (Rev. Bd. 1983); *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1985), *review denied*, 57 RR 2d 1147 (1985). On the basis of the findings discussed below, revocation of County's license for Station WKSP(AM) is required.

36. Item 10(b) of FCC Form 301 requires the disclosure of any pending proceeding against the applicant or any party to the application involving, *inter alia*, "any felony". For any felony disclosed, the applicant is required to identify the court and the proceeding; a statement of the facts; the nature of the offense; and a description of the current status or disposition of the matter. In response to Item 10(b), County disclosed in its FM application only that there was pending in Federal Court a felony charge against Gregory Knop that was not broadcast related. None of the details required by Item 10(b) was provided apparently because of counsel's alleged belief that Form 301 had been, in effect, modified by the *Character Policy Statement* so as not to require information about drug arrests; and to spare Gregory Knop the embarrassment of having to reveal his criminal activities in a public filing. While County's response to Item 10(b) did promise additional information if requested, the facts and circumstances of the felony charges were not disclosed as required.

37. The belief that the Commission's *Character Policy Statement* somehow modified the requirements for completing FCC Form 301 is without basis in fact or reason, and appears to be no more than an after-the-fact rationalization. Item 10(b) very clearly requested specific information about "any felony." Item 10(b) made no distinction between broadcast or nonbroadcast related felonies. Moreover, there is nothing in the *Character Policy Statement* that so much as even suggests that applicants are free to ignore the explicit directions contained in the Form. Thus, County clearly ignored its affirmative duty to provide specific information required by the application about the charges pending against Gregory Knop. Moreover, County cannot rely upon the advise of counsel as an excuse because it is well established that applicants are responsible for the accuracy of the representations made to the Commission in their submissions. *Wadeco Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980).

38. Moreover, Gregory Knop's expression of embarrassment is not even remotely credible. News of his arrest made every newspaper in his home state of South Carolina. Rather than being self conscious about exposing his illegal activities in an FCC filing, Gregory Knop's real motivation appears to have been his concern that his illegal activities might adversely affect County's chances of getting a new construction permit. Just as he would later do before Judge Hamilton when requesting a reduction in his prison sentence, Gregory Knop resorted to providing the Commission with only as much information as suited his personal needs at the moment. County had a motive to conceal basic qualifying information from the Commission, and Gregory Knop seized the opportunity by playing fast and loose with the Commission's requirements.

39. Although Gregory Knop was given every reasonable opportunity at the hearing to explain why County did not provide a complete and detailed response to Item 10(b) of its application, his testimony was vague and, in some instances, inconsistent. Furthermore, Gregory Knop's overall demeanor was that of a person interested more in providing narrow, self-serving answers, if at all, than being candid and forthcoming.

40. County's omission did not result from Gregory Knop's mere misinterpretation of a Commission policy or his feeling of embarrassment. It was a deliberate attempt to avoid disclosing potentially damaging information. County avoided outright misrepresentation by indicating that there were indeed pending criminal charges against Gregory Knop. However, the language provided by County in its exhibit to Item 10(b) evolved from discussions between applicant and counsel and was cloaked in terms designed to avoid drawing the staff's attention.[7] County's offer to provide further details was merely self-serving verbiage. Had Gregory Knop sincerely believed he had nothing to hide, he would have initially provided all the information required by the application, rather than trying to shift the burden to the Commission to ask for it.

41. The findings establish and it is concluded that County demonstrated a lack of candor by willfully concealing material information from the Commission about Gregory Knop's arrest. Coupled with Knop's unwillingness to be forthcoming at the hearing concerning such willful concealment, it is further concluded that County is not qualified to be a Commission licensee.

SECTION 1.65 ISSUE

42. Pursuant to Section 1.65 of the Commission's Rules, an applicant has the affirmative responsibility for ensuring "the continuing accuracy and completeness of information furnished in a pending application." 47 C.F.R. §1.65(a). Whenever the information is no longer "substantially accurate and complete in all significant respects" it must be amended as promptly as possible but no later than 30 days after the event. 47 C.F.R. §1.65(b).

43. The Commission has stated that it is not interested in trivial reporting failures. Rather, it will consider a reporting violation that involves: (a) unreported interests that are of decisional significance; (b) an intent to conceal; or (c) a pattern of carelessness or inattentiveness. *Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 25 (1983), *modified* 99 FCC 2d 681 (1984).

44. County repeatedly failed to keep its FM application complete and accurate. County did not report Gregory Knop's conviction to the Commission in this proceeding until fourteen months after the fact and only then because it was required to do so by the *HDO*. His conviction clearly constituted a matter of material significance because it impacted on his basic qualifications to be a Commission licensee under the Commission's *Character Policy Statement*. Similarly, significant ownership changes also were unreported to the Commission in this proceeding for eight months.

45. County had an affirmative obligation pursuant to Section 1.65 to report significant matters to the Commission. It deliberately and repeatedly shirked that duty in order to avoid an inquiry into matters that it knew would potentially impact on its qualifications to be a licensee. County's failure to disclose Gregory Knop's conviction, moreover, constituted a continuing course of conduct that began when County filed its FM application. As has been shown, County intentionally failed to report the nature of the crime for which Gregory Knop was arrested in its exhibit to Item 10(b). Later, County failed to report the nature of the crime for which he was convicted in its application for renewal of license of WKSP(AM). County's failure to disclose Gregory Knop's conviction in this proceeding, therefore, further demonstrates a pattern of behavior designed to hide from the Commission information that weighed heavily against the grant of a construction permit. Given the obvious motive as well as County's continuing course of conduct aimed at avoiding disclosure, the suggestion that County merely forgot to report information to the Commission must be rejected. It is concluded that County willfully and repeatedly violated Section 1.65 of the Commission's Rules. County's Section 1.65 violations provides a separate and independent basis for County's disqualification.[8]

46. In summary, Gregory Knop's drug conviction, County's demonstrated lack of candor in willfully concealing material information about Knop's arrest, and County's willful and repeated violation of Section 1.65 of the Rules compel the conclusion that County lacks the basic qualifications to remain a licensee. Pursuant to Sections 312(a)(1), 312(a)(2), and 312(a)(4) of the Communications Act of 1934, as amended, the license of Station WKSP(AM), Kingstree, South Carolina, is revoked. Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[9] the license of Williamsburg County Broadcasting Corp., for Station WKSP(AM), Kingstree, South Carolina IS REVOKED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Subsequently, for reasons unrelated to the revocation proceeding, the Presiding Judge, by *Memorandum Opinion and Order*, FCC 90M-2878 (released September 12, 1990), dismissed with prejudice County's FM application. In his *Memorandum Opinion and Order* dismissing County's FM application, the Presiding Judge also ordered that the remaining FM application of Augusta Radio Fellowship Institute d/b/a South Carolina Radio Fellowship be severed from the WKSP(AM) revocation proceeding. However, because the FM and revocation proceedings share a common docket number, the caption above retains the two proceedings in consolidated form for administrative convenience.

[2] In *Order*, FCC 89M-387 (released February 7, 1989), the Presiding Judge added the following issues against County in the FM proceeding:

> (a) To determine whether Williamsburg County Broadcasting Corp. misrepresented facts or was lacking in candor in its application in failing to provide full disclosure of the felony charges pending against Gregory Knop, and failing to disclose the conviction of Allyn Knop.
>
> (b) To determine whether Williamsburg County Broadcasting Corp. violated Section 1.65 of the rules by failing to report the felony conviction of Gregory Knop and changes in the composition of the applicant.

(c) To determine, in light of the felony convictions of Gregory and Allyn Knop and the evidence adduced under (a) and (b) above whether Williamsburg County Broadcasting Corp. is qualified to be a licensee of the Commission .

[3] The record does not disclose the exact date.

[4] The radio station shared the same telephone number as Gregory Knop's trailer home, which was located on the same property (MMB Ex. 2; Tr. 595). Thus, when the telephone rang at WKSP(AM), it also rang in his home (Tr. 584-585). Even when he was in his home, Gregory Knop answered the telephone by saying, "WKSP," thereby holding himself out to whomever was calling that it was the radio station that the caller was reaching (Tr. 585).

[5] As discussed, *supra*, Gregory Knop was convicted in November 1987, rather than early 1988. He was sentenced in January 1988.

[6] The *Character Policy Statement* describes misconduct as "non-FCC" if it was not in violation of the Communications Act or "a specific . . . rule or policy" of the FCC.

[7] This apparently succeeded with respect to County's application for renewal of license of WKSP(AM) which was routinely granted.

[8] As noted by the Bureau, Knop's admission that he twice bribed a law official for information about upcoming police drug raids and the evidence showing his lying to a federal judge in order to obtain a reduction in the length of his prison sentence raises additional reasons why County should not be permitted to hold a Commission license.

[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT GENERAL CORPORATION — File No. I-T-C-9-034

Application for authority to establish channels of communication between an international earth station at Clarksburg, Maryland and INTELSAT satellites for the provision of INTELSAT Business Services and test and monitoring functions.

Application for authority to modify and operate the 10-meter C-band Torus antenna (Call Sign WA-27) at Clarksburg, Maryland for the provision of INTELSAT Business Services and test and monitoring functions. — File No. CSG-90-011-ML

ORDER AND AUTHORIZATION

Adopted: December 11, 1990; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on December 13, 1989, and as amended on December 15, 1989; January 5, January 10, January 11, March 13, May 22, October 22, and October 30, 1990, by Comsat General Corporation (Comsat General), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between international earth station facilities at Clarksburg, Maryland and INTELSAT satellites for the provision of INTELSAT Business Services (IBS). Further, authority is requested pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to modify its developmental license, Call Sign WA-27, to convert and operate the international earth station facilities at Clarksburg, Maryland, for the provision of IBS and INTELSAT monitoring in the Atlantic Ocean Region (AOR). The applications were placed on public notice on December 20, 1989. No comments were received.

2. The proposed earth station is located at Clarksburg, Maryland and consists of a 10-meter Multiple Beam Torus Antenna[1] which shall meet INTELSAT Standard B technical parameters. One horn of the antenna will operate with the INTELSAT AOR satellite located at 335.5 degrees East Longitude (E.L.) in the 6157-6166 MHz transmitting frequency band and the 3932-3941 MHz receiving frequency band in support of the Department of Defense Caribbean Area Regional Network. The earth station will be used to provide one 1.544 Mbps circuit between Clarksburg, Maryland and Pamerola Air Base, Honduras. Emissions are limited to 1M54G1W, the maximum effective isotropic radiated power (E.I.R.P.) per carrier shall not exceed 68.6 dBW, and the maximum E.I.R.P. density shall not exceed 42.7 dBW/4kHz. Another horn of the antenna will operate with the INTELSAT AOR satellite located at 341.5 degrees (E.L.) to permit periodic pre-installation testing of RF, IF and baseband equipment to be shipped overseas in connection with Comsat General's Voice of America (VOA) international network. On this satellite, the earth station will operate on the transmitting frequency 6230.4175 MHz and the receiving frequency 4005.7325 MHz. Emissions are limited to 320KG1W, the maximum E.I.R.P. per carrier shall not exceed 55.0 dBW, and the maximum E.I.R.P. density shall not exceed 79.0 dBW/4kHz. Additionally, the earth station will be used to monitor INTELSAT AOR satellites between 324.5 degrees E.L. and 342.0 degrees E.L. pursuant to a contractual arrangement between Comsat World System Division and Comsat General to verify that U.S. customers are receiving the proper signal power in the C-band.

3. Comsat General's legal, financial and technical qualifications to modify and operate the proposed earth station are established. Comsat General provides various international services and has been authorized to construct and operate other earth station facilities for IBS services. Comsat General has completed the necessary frequency coordination.

4. The proposed earth station is consistent with the Commission's policy on the ownership and operation of U.S. international earth stations[2] and its scope of operation will be the same as that permitted by the Commission in previous IBS authorizations. [3] We will limit the authorization to the provision of INTELSAT monitoring functions, IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

5. Upon consideration of the applications, we find that authorization of the requested services and modification of earth station facilities would serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File Nos. I-T-C-90-034 and CSG-90-011-ML ARE GRANTED, and Comsat General is authorized to:

a. modify and operate its C-band 10-meter Multiple Beam Torus antenna (Call Sign WA-27) at Clarksburg, Maryland, to provide IBS and related digital video services,[4] to permit periodic pre-installation testing of RF, IF and baseband equipment to be shipped overseas in connection with Comsat General's VOA international network; and to monitor INTELSAT AOR satellites for Comsat World Sys-

tem Division to verify the proper receiving signal power in the C-band as specified in paragraph 2 above; and

b. establish channels of communication between the Clarksburg, Maryland earth station (Call Sign WA-27) and INTELSAT AOR satellites for the provision of IBS and related digital video services between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or digital video services; to permit periodic pre-installation testing of RF, IF and baseband equipment to be shipped overseas in connection with Comsat General's VOA international network; and to monitor INTELSAT AOR satellites for Comsat World System Division to verify the proper receiving signal power in the C-band.

7. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Comsat General and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Comsat has surrendered its authority for the 15 foot parabolic antenna and is supplanting its authority for the 10-meter Multiple Beam Torus antenna on its developmental license (Call Sign WA-27) with the authority in this application. The torus antenna may actually have several feed horns tracking different INTELSAT AOR satellites at the same. time.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will! be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C, C & S Telco, Inc.

State Long Distance
Telephone Company

Amery Telephone Company
Clear Lake Telephone Company
Dickeyville Telephone Corporation
Farmers Telephone Company
Lemonweir Valley Telephone Company
Price County Telephone Company
Southeast Telephone Company of
Wisconsin, Inc.
Union Telephone Company
Kendall Telephone, Inc.

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief, Common Carrier Bureau

1. In this order we grant three petitions for waiver of the Commission's equal access rules filed by various independent telephone companies (ITCs). In the *ITC Equal Access Order*,[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies (GTOCs) under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that the timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an OCC. The Commission directed ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[4] Moreover, the *ITC Equal Access Order* provided that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[5]

3. In this order, we consider three petitions for waiver of the equal access implementation requirements filed by independent telephone companies.[6] All of these independent telephone companies received requests in March 1988 for equal access conversions from the same interexchange carrier, MCI Telecommunications Corporation (MCI).

4. C, C & S Telco, Inc. (CC&S) states that on March 3, 1988, it received a letter from MCI requesting that CC&S convert some of its facilities to equal access.[7] CC&S states that it is required to complete the conversion within three years of the request date, that is, by March 2, 1991. On May 19, 1990, CC&S filed a petition for a temporary waiver of the Commission's equal access conversion requirements. CC&S seeks an additional seven months, until October 1, 1991, to complete the equal access conversion.

5. CC&S states that at the time MCI submitted its request, all of CC&S's exchanges had electromechanical switches, but that it has since begun to convert all of its central offices to digital technology. CC&S states that it has completed the digital conversion process for eight of its Michigan exchanges, but that an additional seven months would permit CC&S to convert the remaining offices and to ensure that the equal access conversion process is conducted smoothly. In addition, CC&S argues that it would be cost effective to implement equal access in all of its facilities simultaneously because of the expenses associated with balloting, allocation, and marketing.

6. In March 1988, State Long Distance Telephone Company (State) received a letter from MCI requesting that State convert its facilities to equal access. State is required to complete the equal access conversion by March 1991. On May 18, 1990, State filed a waiver request seeking an additional three months, until June 1, 1991, to comply with the equal access implementation requirements. According to State, the implementation process involves replacing its existing NEC 61K switch with a NEC 61E switch. State asserts that the new switch will not be available from the switch manufacturer until February 1991, and this will not provide State with sufficient time to install and test the new equipment by March. According to State, equal access conversion should be completed by June 1, 1991, and MCI does not object to the new completion date.

7. The third petition for a waiver of the equal access implementation requirements was filed on May 18, 1990, on behalf of nine small Wisconsin independent telephone companies.[8] According to the petition, in March 1988, each of the companies received a letter from MCI requesting that the telephone company convert its facilities to equal access. Pursuant to the Commission's requirements, those companies are required to complete the equal access conversions by March 1991.[9] The petitioners state that, for various reasons, they require additional time to complete the equal access conversions. The petition states that MCI has agreed to the new completion dates.

8. Amery and Lemonweir each request an additional eighteen months, until September 1992, to implement equal access. Amery and Lemonweir state that their present switches require upgraded processors before they can provide equal access, but that the upgraded processors

are not yet available for commercial use. Both companies state that they have been assured by the vendor that the equipment will be delivered in time to be installed and tested by September 1992.

9. Farmers seeks an additional four and one-half years, until September 1995. Price seeks a one year extension, until March 1992. Southeast requests an additional fifteen months, until July 1992. These three companies state that they seek additional time to comply with the equal access implementation requirements because their NEC switches cannot be upgraded to provide equal access. The companies state that they intend to replace their NEC switches, but the switches will not be fully depreciated until after the three year conversion time period has expired. Farmers adds that it is already depreciating its NEC switch on an accelerated basis. The companies request the additional time to allow for the full depreciation of their existing switches and to avoid unreasonable revenue requirement burdens on their subscribers.

10. Clear Lake requests an additional three and one-fourth years, until June 1994, and Dickeyville requests an additional four and one-half years, until September 1995. Both companies state that upgrading their present switches for equal access within the required three years would not be financially feasible.[10] The companies state that their resources would be better used and their customers would be better served if the companies replace existing switches with "state-of-the-art" switches, once they have fully depreciated their existing switches.

11. Union seeks an additional year, until March 1992, to complete its equal access conversion. Union states that its existing Stromberg Carlson switching equipment will require upgrading in order to implement equal access, and that the conversion is not financially feasible by March 1991.

12. Based upon our review of the record, we conclude that the requested waivers are in the public interest. Each of the petitioners has set forth specific circumstances justifying its request, and no one has opposed any of the waiver requests.[11] In every case but one, MCI has agreed to the petitioner's proposed new completion date for equal access conversion. In the remaining case, CC&S has requested only seven months, which MCI has not opposed. Thus, we conclude that each of the companies has demonstrated that the timetable established by the Commission's rules is not feasible "except at costs that clearly outweigh potential benefits to users."[12]

13. Accordingly, IT IS ORDERED that these petitions for waiver of the equal access implementation requirements, are GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE* Corp., 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at paras. 48-49.

[5] *Id.* at para. 50.

[6] We placed these requests on Public Notice on July 6, 1990. *See* 5 FCC Rcd 4030.

[7] CC&S is a Tier II exchange carrier that is wholly-owned by Rochester Telephone Company. CC&S states that it has approximately 20,000 access lines in fourteen exchanges in Michigan and Ohio. CC&S notes that MCI did not request equal access conversion for CC&S's exchanges in Cooney, Ohio, and Osseo-Pittsford, Michigan. CC&S states that it would be practical for CC&S to convert all of its exchanges simultaneously and includes these two exchanges in its waiver petition.

[8] The nine petitioners are: Amery Telephone Company (Amery); Clear Lake Telephone Company (Clear Lake); Dickeyville Telephone Corporation (Dickeyville); Farmers Telephone Company (Farmers); Lemonweir Valley Telephone Company (Lemonweir); Price County Telephone Company (Price); Southeast Telephone Company of Wisconsin, Inc. (Southeast); Union Telephone Company (Union); and Kendall Telephone, Inc. (Kendall).

[9] Although the joint petition requests a waiver for Kendall, in the reply comments, the petitioners withdraw Kendall's request. The petitioners state that Kendall should be excluded from the joint waiver petition because Kendall is equipped with an electromechanical switch without stored program control capability and therefore is not required to comply with the Commission's equal access requirements. Reply Comments of Amery Telephone Company, et al. at 2.

[10] For example, Clear Lake states that it would cost about $300 per access line to upgrade the existing switches. Petition at 4.

[11] The only comments received in response to these requests were supportive. *See* United States Telephone Association Comments at 2; National Telephone Cooperative Association Comments at 5.

[12] *See ITC Equal Access Order* at para. 50. Our decision does not encompass the waiver request by Kendall, which it has withdrawn. *See* note 9 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RADIO CALL
COMPANY, INC. File Nos.:

For facilities	20544-CD-P/L-01-90; 20548-CD-P/L-01-90
in the Public	20732-CD-P/L-01-90; 20733-CD-P/L-01-90
Land Mobile	20735-CD-P/L-01-90; 20741-CD-P/L-01-90
Service at	20777-CD-P/L-01-90; 20780-CD-P/L-01-90
various	20781-CD-P/L-01-90; 20837-CD-P/L-01-90
locations	20856-CD-P/L-01-90; 20857-CD-P/L-01-90
in New York,	20859-CD-P/L-01-90; 20865-CD-P/L-01-90
New Jersey,	20878-CD-P/L-01-90; 21056-CD-P/L-01-90
and	21057-CD-P/L-01-90; 21058-CD-P/L-01-90
Connecticut	21064-CD-P/L-01-90; 21065-CD-P/L-01-90
	21066-CD-P/L-01-90; 21067-CD-P/L-01-90
	21085-CD-P/L-01-90; 21093-CD-P/L-01-90
	22509-CD-P/L-01-90

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief, Common Carrier Bureau:

1. Radio Call Company, Inc. (Radio Call) filed a Consolidated Petition for Reconsideration of the action of the Mobile Services Division (MSD) dismissing its applications for various frequencies and locations in New York, New Jersey, and Connecticut.[1] Page America of New York, Inc. (Page America) and Bell Atlantic filed oppositions to Radio Call's petition, and Radio Call filed a consolidated reply. For the reasons set forth below, we deny reconsideration and affirm dismissal of the applications.

I. BACKGROUND

2. Radio Call filed applications for various two-way, common-carrier facilities to operate in New York, New Jersey, and Connecticut[2] in contemplation of expanding certain NYNEX Paging Company, Inc. (NYNEX) Improved Mobile Telephone System (IMTS) two-way facilities in New York City. Radio Call requested a waiver of Section 22.516(a) [3] of the Commission's rules to permit it to delay the filing of load studies pursuant to Section 22.16 of the Commission's rules[4] until the consummation of the partial assignment of licenses from NYNEX to Radio Call took place. The applications were allowed to remain on file without loading studies. After the assignments had been consummated, it was determined that traffic loading studies were required. Subsequently, Radio Call filed amendments for some of the captioned applications to provide traffic load studies pursuant to Section 22.16. On May 29, 1990, the MSD dismissed two of Radio Call's three applications for Pleasantville, New Jersey (Pleasantville), because Radio Call did not justify an initial three-channel grant pursuant to Section 22.16(b).[5] (The Pleasantville applications were for initial channels.) The MSD also dismissed the remaining applications at the various other New York, New Jersey, and Connecticut locations because they did not demonstrate need pursuant to Section 22.16(a) of the rules.

II. CONTENTIONS OF THE PARTIES

3. Radio Call argues that the MSD action was not correct because it ignored Radio Call's loading studies and Section 22.16(b)(2) of the Rules.[6] Radio Call also requests that should the MSD affirm its decision, it be allowed to choose frequency 454.650 MHz rather than 454.575 MHz.[7] Radio Call additionally asserts that its pending request for a waiver of the loading requirements of Section 22.16 is a basis for granting reconsideration and reinstatement of the applications. In support, Radio Call claims that it would not warehouse frequencies because it constructs and operates every grant it receives and its proposed wide-area service would use the spectrum more efficiently.

4. In opposition, Page America contends that Radio Call did not comply with the rules because it did not have written held orders or conduct a valid statistical survey indicating that the existing subscribers on the New York system either requested or needed service at any of the proposed locations. Page America also argues that Radio Call's waiver request does not meet the requirements of the rules.

5. Bell Atlantic by letter states that it previously objected to seven of the twenty-five captioned applications for various technical reasons. Consequently, it requests that, if Radio Call's petition is granted, the seven applications not be granted pending Radio Call's showing that there would not be harmful interference to the co-channel facilities of Bell Atlantic's subsidiary, New Jersey Bell.

6. In reply, Radio Call argues that Page America and Bell Atlantic fail to rebut Radio Call's assertion that a waiver of Section 22.16 is warranted. Radio Call further asserts that neither Page America nor Bell Atlantic object to its request to select frequency 454.650 MHz at Pleasantville if the Commission does not reinstate the dismissed applications. Finally, Radio Call alleges that Page America's opposition is an anticompetitive attempt to block Radio Call's expansion of service.

III. DISCUSSION

7. With the exception of the Pleasantville applications, all the applications requested facilities that were located near existing Radio Call facilities (or Radio Call's affiliate, MRN Communications, Inc.) authorized to operate on a different frequency.[8] To demonstrate need, Section 22.16(a) clearly states that an applicant requesting additional channels on an existing two-way system (up to a maximum of four channels) has to show that its existing grade of service is 0.25 or greater. *See Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service*, 53 Rad. Reg. 2d (P&F) 191 (1983) (*Regulatory Policies*). Accordingly, applicants must submit traffic loading studies for existing units and supply held orders or survey results for projected units. For these studies, a mobile unit will be considered as generating traffic in a proposed system if it falls into any one of three categories:

(1) present subscriber units, (2) subscriber units for which there are written held orders, or (3) subscriber units projected through use of valid statistical surveys. *See* Section 22.16(a)(2)(iii). Radio Call did not submit loading studies for its existing facilities. Rather, Radio Call's need showings for all of the proposed facilities consisted of 113 subscriber units located in New York City obtained as a result of the assignment from NYNEX. These 113 subscriber units could not be credited for any of the proposed facilities because they were not located within the reliable service area of any of the proposed facilities. Moreover, the units serving the New York City service area are only applicable to traffic loading studies for additional channels for the New York City service area and are not acceptable as new orders for service to other areas.[9] Therefore, the MSD's dismissal of these applications for failing to justify need for the additional channels was proper.

8. Radio Call's Pleasantville proposals were for new two-way systems. To determine need for a proposal, an applicant must demonstrate an expected grade of service less than 0.25. An applicant must specify the number of units expected to receive service. Units shall be considered only if the applicant has written held orders for them or if they are projected from a valid statistical survey. *See* Section 22.16(b)(3). Radio Call did not submit written held orders or valid statistical surveys. It tried to justify these facilities using the 113 subscriber units in New York City. As stated in the previous paragraph, these subscriber units could not be used to demonstrate need in another service area. Therefore, the MSD was correct in dismissing two of these applications.[10]

9. The MSD was not arbitrary in permitting the application for frequency 454.575 MHz to remain on file. The Commission's database was searched and the applications for the frequencies 454.650 MHz and 454.525 MHz were determined to be electrically mutually exclusive with competing applications.[11] Moreover, because Radio Call proposed two-way IMTS service, all the mobile units can transmit and receive on all frequencies in a particular band. Thus, there is no apparent reason why one frequency in the band would be more desirable than any other frequency. Consequently, Radio Call has not justified reversing the MSD's dismissal of the applications for frequencies 454.525 MHz or 454.650 MHz or to reconsider the grant of frequency 454.575 MHz.

10. Section 22.19(a) of the rules specifies the showing that is required to support a waiver request.[12] Radio Call has not demonstrated that the purpose of the rule, *i.e.*, preventing the warehousing of frequencies, is being improperly applied in this case. *See Regulatory Policies*, *supra* at 193. Radio Call has not shown that it is currently operating at a sufficient capacity to justify additional frequencies at this time. Thus, granting a waiver of the requirement for loading studies would undermine the policy codified by the rule. *See generally Northeast Cellular Telephone Company, L. P., et al., v. FCC*, Nos. 89-1206 & 89-1214 slip op. at 5 (D.C. Cir. Mar. 9, 1990); *see also Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Basic Exchange Telecommunications Radio Service*, 4 FCC Rcd 5017, 5018 (1989); *cf. Mobile Phone of Texas, Inc.*, 5 FCC Rcd 3459 (Com. Car. Bur. 1990). In addition, Radio Call's claim that its proposed wide-area service would increase the efficient use of the spectrum has not been demonstrated. Moreover, Radio Call did not show that its unique circumstances render application of the rule inequitable or contrary to the public interest or that there was a lack of a reasonable alternative. In sum, the record in this case demonstrates that compliance with the rule is in the public interest to prevent frequency warehousing.

11. We also find that there is no merit to Radio Call's general allegation that Page America is acting in an anticompetitive manner affecting the public interest. Moreover, there are numerous paging carriers and paging frequencies available in these areas, and Radio Call has not demonstrated that it can not obtain additional spectrum or that Page America controls all of these channels.[13]

12. In conclusion, we find that Radio Call has failed to demonstrate any reversible error on the part of the MSD and, thus, we affirm the MSD's action.

IV. ORDERING PARAGRAPH

13. Accordingly, IT IS ORDERED that the Consolidated Petition for Reconsideration filed by Radio Call Company Inc. involving the captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard C. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Letters to Rosenman & Colin (counsel for Radio Call) from Gregory J. Vogt, Chief, MSD (May 29, 1990); Public Notice, Rpt. No. PMS-90-36-A, Mimeo No. 3449 (released June 6, 1990).

[2] The applications are for facilities on the following frequencies at the following locations: 454.375 MHz, 454.525 MHz, and 454.650 MHz at Trumbull, Connecticut; 454.525 MHz, 454.575 MHz, and 454.650 MHz at Freehold, New Jersey; 454.525 MHz, 454.575 MHz, and 454.650 MHz at Pleasantville, New Jersey; 454.375 MHz, 454.525 MHz, and 454.650 MHz at Hauppauge, New York; 454.525 MHz, 454.575 MHz, and 454.650 MHz at Beachwood, New Jersey; 454.375 MHz, 454.425 MHz, 454.475 MHz, 454.525 MHz, 454.575 MHz, and 454.650 MHz at Meriden, Connecticut; 454.400 MHz, 454.425 MHz, 454.475 MHz, 454.500 MHz, and 454.575 MHz at Noyack, New Jersey; 454.375 MHz, 454.575 MHz, and 454.650 MHz at Red Bank, New Jersey; 454.475 MHz, 454.525 MHz, and 454.575 MHz at Mahopac, New York; 454.575 MHz and 454.650 MHz at Rocky Hill, New Jersey; 454.400 MHz and 454.500 MHz at Manorville, New York; 454.500 MHz at New Haven, Connecticut; 454.625 MHz at Stamford, Connecticut; 454.525 MHz at Trenton New Jersey; and 454.525 MHz at Dover, New Jersey.

[3] Section 22.516(a) sets forth when traffic load studies are required to justify additional channels.

[4] Section 22.16 sets forth the objective need standards to justify additional channels. Section 22.16(a) requires operators of existing two-way systems seeking additional channels to demonstrate need by showing that the existing system's present (or projected) grade of service is 0.25 or greater. Section 22.16(b)

allows applicants for more than one channel for a new two-way system to demonstrate need based on an expected grade of service.

[5] As pointed out in note 2, *supra*, Radio Call requested frequencies 454.525 MHz, 454.575 MHz, and 454.650 MHz at Pleasantville. The MSD retained on file Radio Call's application for frequency 454.575 MHz but dismissed the remaining two applications.

[6] Section 22.16(b)(2) provides:

> If the proposed service area and type of service are not substantially the same as those existing, the channels requested will be treated as new rather than as additional channels. Applications are considered to be requesting initial channels if less than 50% of the proposed reliable service area contour overlaps an existing contour, or if the proposed service area contour includes a major market area not included within the existing contour.

[7] *See supra* note 5.

[8] Radio Call's applications could not be treated as additional channels for new rather than existing systems because the proposed service areas were the same as Radio Call's existing service areas. Therefore, the proposals did not comply with the provisions of Section 22.16(b)(2). Further, for new multiple channels, an objective need showing is required, *see* Section 22.16(b), and Radio Call did not provide such a showing, *see* para. 9, *infra*. Moreover, the proposed facilities were not fill-in transmitters under Section 22.16(e). Therefore, traffic loading studies under Section 22.16(a) were required.

[9] In *Digital Paging Systems of Philadelphia, Inc.*, 5 FCC Rcd 1737 (1990), the Commission stated that certain held orders for service could not be fully credited because they were not located within the proposed reliable service area.

[10] *See* note 5, *supra*.

[11] Applications of Mobilfone of Northeastern Pennsylvania, Inc., File No. 22878-CD-P/L-90, which requested frequency 454.650 MHz at Atlantic City, New Jersey; and Page America of New York, Inc., File No. 22117-CD-P/L-90, which requested frequency 454.525 MHz at Manahawkin, New Jersey.

[12] Section 22.19(a) provides:

> (a) *Request for waivers.* (1) Waivers of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing[:] (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

[13] The Commission favors competition in the provision of communications services. *See Competitive Carrier Rule Making, First Report and Order*, 85 FCC 2d 1 (1980); *see also Preemption of State Entry in the Public Land Mobile Service*, 59 Rad. Reg. 2d (P&F) 1518 (1986), *remanded on othergrounds, NARUC v. FCC*, No. 86-1205 (D.C. Cir. Mar. 30, 1987); *clarified*, 2 FCC Rcd 6434 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

FLORIDA CELLULAR MOBILE COMMUNICATION CORPORATION File No. 10854-CL-P-468-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 468, Maryland 2 (Kent)

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief, Mobile Services Division:

1. JAJ Cellular Partnership (JAJ) has filed a Petition to Dismiss or Deny (Petition) against Florida Cellular Mobile Communications Corporation (Florida), the tentative selectee in the above-referenced RSA. JAJ alleges that a Florida shareholder holds an interest in another application for the same market and that Florida's ownership disclosures are inadequate and inconsistent. Florida requests a waiver of Section 22.922 of the rules which prohibits transfer of cellular interests prior to a grant. We have reviewed the record and we find Florida's application violates Section 22.921(b) of the Commission rules forbiding any party to hold an interest in more than one non-wireline cellular application in a single RSA market.

I. BACKGROUND

2. Florida is the tentative selectee for the Maryland 2 (Kent) RSA.[1] On May 14, 1990, JAJ filed a Petition to Deny against Florida, alleging that Yerger C. Yandell, a shareholder in Florida, also holds a five percent interest in Kudzu Cellular Partnership (Kudzu). Kudzu is also an applicant for a nonwireline authorization in the Maryland 2 market. Although Florida requests a waiver of Section 22.922 of the Commission's rules to allow Mr. Yandell to divest his interest in Florida, JAJ urges the Commission only to consider the application as originally filed. Otherwise, JAJ argues, applicants would be allowed to amend their applications in violation of Section 22.921(b)(1), which prohibits any party from holding an interest in two RSA applications for the same market, negating the meaning of the rule. JAJ also alleges that Florida's waiver request lacks adequate evidentiary support as required by Section 22.19 of the Commission's rules, and that sale of Yandell's ownership to Florida may allow Yandell to profit from his wrongdoing. JAJ asserts that Florida provided no affidavits from Yandell to substantiate the claims underlying the waiver request. Finally, JAJ alleges that Florida's application fails to name its corporate directors, makes unexplained ownership information changes in an amendment, and does not explain certain relationships among its shareholders.

3. In its Opposition, Florida concedes that Yandell simultaneously held interests in two applications for the Maryland 2 market. In its April 24, 1990 Request for a Waiver of Section 22.922, Florida asserts that Mr. Yandell originally purchased his shares in Florida when Florida was intending to file applications only in seven Metropolitan Service Areas (MSA). No MSA applications were ever filed by Florida, however. Accordingly, Florida alleges, Yandell "wrote off" his investment and later moved without informing Florida. Florida sent notices to all shareholders of annual meetings and other matters including possible litigation with a shareholder over Florida's failure to file in any MSAs. Florida alleges that at least one of these notices was returned to it as undeliverable. In its settlement with the complaining shareholder, Florida agreed to file in 125 Rural Service Areas (RSA). Maryland 2 (Kent) was one of these markets. In the meantime, Yandell, who according to Florida thought Florida no longer existed, acquired an interest in Kudzu, which also filed an application in Maryland 2 (Kent). Florida therefore requests permission, through a waiver of Section 22.922, to allow Yandell to divest his interest in Florida in order to bring Florida's application into compliance with the rules. Florida states that it is willing to accept whatever terms the Commission may impose on the transfer of Yandell's interest in Florida so that Yandell does not profit from his prohibited interest in the two applications. Florida also concedes that its application, as originally filed, contained several minor errors in shareholder information. It argues that these errors were properly corrected in a timely-filed amendment and, in any case do not warrant dismissal of its application.

II. DISCUSSION

4. Section 22.921 of the Commission's rules[2] prohibits any party from holding an interest in two applications for the same RSA market. The fact that Yandell did violate this provision is uncontroverted. However, Florida argues that Yandell should be allowed to transfer his shares to correct the violation. No corrective action by the Commission can alter the fact that Florida's application, at the time it was filed, was defective. In the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission amended Section 22.921 to forbid *any* ownership in more than one application for the same RSA market, specifically superseding the earlier prohibition against multiple ownership interests exceeding one percent for MSA markets. This action demonstrates the importance the Commission has placed on disallowing all multiple ownership interests. Section 22.20 of the Commission's rules provides that an application will be returned to the applicant as unacceptable for filing if the applicant fails to comply with the Commission's rules. [3] Florida's application violated the prohibition against a party having ownership interests in more than one application in a market. We find no compelling public interest justification for determining that Florida or Yandell should not be required to comply with Section 22.921. Accordingly, Florida's application will be returned as defective. Yandell also held an interest in Kudzu when the Florida application was filed, which renders the Kudzu application for the Mary-

land 2 (Kent) cellular authorization defective at the time it was filed.[4] Therefore, the Kudzu application will also be returned as defective.

5. Florida's arguments in support of its waiver to permit transfer of Yandell's interest in Florida are not sufficient to overcome the Commission's strict policy to comply with Section 22.921. Having found Florida's application defective, the Commission will not consider Florida's waiver request to allow Yandell to transfer his interest. *See generally*, Letter from Gregory J. Vogt to Henry A. Solomon (May 2, 1990 Reference No. 63500-LD). A defective application may not be amended after the filing date or the lottery date to bring it into compliance with the Commission's rules. *Rem Communication*, 3 FCC Rcd 3705 (1988). Because we have found Florida's application defective for this violation, we do not need to address JAJ's other arguments.

III. CONCLUSION AND ORDERING PARAGRAPHS

6. For the reasons set forth herein, we find that Florida Cellular Mobile Communication Corporation has filed a defective application in violation of Section 22.922 of the Commission's rules.

7. Accordingly, IT IS ORDERED that Petition to Dismiss or Deny filed be JAJ Cellular Partnership IS HEREBY GRANTED.

8. IT IS FURTHER ORDERED that the application of Florida Cellular Mobile Communication Corporation, File No. 10854-CL-P-468-A-89, IS HEREBY DISMISSED.

9. IT IS FURTHER ORDERED that the request for a waiver of 47 C.F.R. Section 22.921 filed by Florida IS HEREBY DISMISSED as moot.

10. IT IS FURTHER ORDERED that the application of Kudzu Cellular Partnership for RSA market No. 468A IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice Report No. CL-90-51 (released November 24, 1989).

[2] Section 22.921 of the Commission's rules states in pertinent part:

> (b) . . . For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. . .

[3] Section 22.20 of the Commission's rules states in pertinent part:

> (a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant . . . if:
>
> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

[4] Florida did not file an application for the Connecticut 2 market and, therefore, Kudzu's award in Connecticut 2 is unaffected by this decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

For Selection of Tentative Selectees for 900 MHz Common Carrier Paging Frequencies in the Greater New York City Metropolitan Area — Lottery No. PMS-31

ERRATUM

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief, Common Carrier Bureau:

1. In Order on Reconsideration, Public Mobile Services Lottery, PMS-31, DA 90-1611 (released December 11, 1990), paragraph 21, which orders the denial of applications of Contact Communications, Inc., and paragraph 22, which orders the denial of applications of Enhanced Telecommunications Services, should be revised to read as follows:

> 21. IT IS FURTHER ORDERED that, after review of the proposed locations, the applications of Contact Communications, Inc., File Nos. 28245-CD-P/L-01-88 and 28247-CD-P/L-01-88, ARE DENIED.
>
> 22. IT IS FURTHER ORDERED that, after review of the proposed locations, the applications of Enhanced Telecommunications Services, Inc. File Nos. 27392-CD-P/L-88, 27400-CD-P/L-88, and 27429-CD-P/L-88, REMAIN PENDING AND WILL BE PROCESSED in accordance with procedures for 900 MHz applications.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and
Telegraph Company

Comparably Efficient
Interconnection Plan for
Enhanced Services Complex

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1990; Released: January 18, 1991

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 30, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed a Comparably Efficient Interconnection (CEI) Plan for a variety of enhanced voice and data services offered through AT&T's Enhanced Services Complex (ESC). In September 1989, the Bureau decided to approve certain portions of the plan, and permit AT&T to use the ESC to provide three categories of interactive voice service (IVS).[2] The Bureau deferred action on the remaining services that AT&T proposed because the plan did not fully describe the specific interactive data services (IDS) AT&T intended to provide. On April 5, 1990, AT&T filed a letter supplementing its initial CEI plan. [3] In its letter, AT&T describes in detail the categories of enhanced interactive data services (IDS) it proposes to offer through the ESC and requests approval to provide IDS. In this Order, we approve AT&T's offering of IDS through the ESC under the same terms and conditions applied to IVS.

II. BACKGROUND

2. The United States Court of Appeals for the Ninth Circuit recently vacated certain of the *Computer III* decisions and remanded them to the Commission for further proceedings consistent with its opinion.[4] In response to the Court's decision, the Commission recently adopted an Order that reinstated certain *Computer III* decisions that were not challenged in the briefs before the Court.[5] The Order permits AT&T to provide collocated and noncollocated enhanced services on an integrated basis pursuant to the nonstructural safeguards developed in the *Computer III* decisions.[6]

3. Under the requirements of the *Phase I Order* and the *Phase I Reconsideration Order*, AT&T may offer a specific enhanced service, or class of services, on an unseparated basis only after approval of a CEI plan.[7] In its CEI plan, AT&T must demonstrate that it will provide interconnection opportunities to others on an "equal access" basis, making basic facilities available to other enhanced service providers (ESPs) and users on an unbundled and functionally equal basis.[8] A CEI plan must satisfy specific CEI parameters, as well as other nonstructural safeguards governing cost allocations, the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[9]

III. SERVICE DESCRIPTION

4. In its original CEI plan, AT&T proposed a network architecture that would allow AT&T to offer various voice and data enhanced services through equipment located at AT&T's central offices. According to AT&T, the ESC, when collocated, would be comprised of a variety of unregulated equipment, such as digital switching equipment, voice response units, application processors and host gateway processors.[10] AT&T initially proposed to use the ESC to offer voice services, but stated that, in the future, it would also provide data services through the ESC. We approved AT&T's provision of the voice services, and deferred ruling on its provision of data services until AT&T filed additional specific information on its proposed data offerings.

5. AT&T now requests authority to provide IDS in connection with the ESC. AT&T states that IDS applications fall into essentially the same three categories as IVS: transaction offerings, information offerings and electronic messaging offerings.[11] AT&T notes that for CEI purposes, the only difference between IVS and IDS offerings is in the customer premises equipment necessary to use them. AT&T states that IVS customers use a telephone while IDS customers use data terminals, facsimile machines and computers.[12] AT&T states that the network configurations it intends to use for providing IDS offerings will be the same as the network configurations used for IVS offerings. AT&T also includes a diagram displaying the ESC architecture to be used for providing IDS. AT&T adds that the underlying basic services it will use to provide IDS offerings are the same as those described in its original plan.[13]

6. AT&T states that IDS transaction offerings allow end users, through the use of data terminal equipment, to retrieve and update information that is stored in AT&T or customer-owned data bases. AT&T states that it will be able to expand its IVS brokerage service to customers that want to access the service via personal computers. AT&T states that IDS information offerings will function in a manner similar to a gateway, facilitating communications between end users and information providers. According to AT&T, end users, by using data terminals, will be able to access (but not modify or add) information stored in either AT&T or customer-owned data bases. AT&T states that IDS electronic messaging offerings will allow users to send and receive electronic messages, and will enable AT&T to expand its external AT&T mail service.[14]

IV. CEI REQUIREMENTS

7. The *Phase I Order* lists nine CEI parameters that all plans must satisfy.[15] These parameters are designed to ensure that the basic services used in the provision of a carrier's enhanced services are available to other ESPs in an equally efficient manner. In addition, all CEI plans must satisfy the CEI pricing requirements and nonstructural safeguards regarding the allocation of joint costs, CPNI, nondiscrimination reporting, and provision

of network technical information. AT&T states that it intends to satisfy the CEI parameters, the CEI pricing rules, and the other nonstructural safeguards in the manner previously described in its initial plan for ESC, which the Bureau approved for IVS offerings.

V. DISCUSSION

8. In the *AT&T ESC Order*, we found that AT&T's proposed offering of IVS through the ESC complied with the CEI parameters, CEI pricing requirements, and the other nonstructural safeguards described in the *Phase I Order*. Based on the additional information provided in its letter, we now conclude that AT&T has satisfied these requirements with respect to the provision of IDS through the ESC. We also find that the information contained in AT&T's supplemental letter permits us to resolve the two issues left outstanding in the *AT&T ESC* Order.

9. Parties filing comments on AT&T's original CEI plan raised issues concerning the specificity of AT&T's description of services. In reviewing the plan, we found that AT&T provided sufficient details on its IVS offering, but due to the lack of specificity, we were unable to determine if the ESC could be used to provide non-IVS offerings such as IDS. In addition, in its comments on AT&T's initial plan IDCMA both argued that AT&T had not complied with the interface functionality requirement, and requested that the Commission require AT&T to specify the basic CEI services that other ESPs will use for interconnection to the ESC. In the *ESC Order* we did not address IDCMA's argument because we did not, in that order, consider AT&T's offering of IDS through the ESC.

10. In its supplemental letter, AT&T provided specific details on its proposed IDS offering. AT&T's letter provides service descriptions for its proposed IDS applications, and states that its IDS offerings will use the same underlying basic services described in the original CEI plan. The letter also states that the interconnection to the basic network for IDS is the same as the interconnection for IVS. AT&T states that it served copies of its supplemental letter on all parties involved in the initial proceeding, and no parties commented on AT&T's supplemental letter. AT&T has now provided us with the specific information necessary to determine that its provision of IDS through the ESC comply with the requirements of the *Phase I Order*. We therefore approve AT&T's provision of IDS through the ESC.

VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, AT&T's CEI Plan for Enhanced Service Complex to provide Interactive Data Services described herein, IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order*), *reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration*), *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990) *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), *reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration*), *Phase II Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990, *appeal bending sub nom.* California v. FCC, N. 88-7183 (9th Cir. filed May 13, 1988).

[2] *See* In the Matter of American Telephone and Telegraph Company Comparably Efficient Interconnection Plan for Enhanced Services Complex, (*AT&T ESC Order*), 4 FCC Rcd 6974 (1989).

[3] *See Ex Parte* Letter from E. C. Fletcher, Division Manager, AT&T, to Donna Searcy, Secretary, FCC, dated April 5, 1990.

[4] *California v. FCC*, No. 87-7230, slip. op. (9th Cir. June 6, 1990). The Commission decisions under review were the *Phase I Order*, the *Phase I Reconsideration*, and the *Phase II Order*.

[5] *See* In the Matter of Computer III Remand Proceedings, Report and Order, CC Docket No. 90-368, FCC No. 90-, adopted December 13, 1990.

[6] Pursuant to the Commission's decision, the Bureau will examine AT&T's plans to determine whether they comply with the CEI requirements of the *Phase I Order*.

[7] In the *Phase I Reconsideration* the Commission relieved AT&T of the comprehensive ONA requirements of the *Phase I Order*, but required AT&T to implement an approved service-specific CEI plan as a precondition to offering each enhanced service integrated or collocated with its basic service facilities. 2 FCC Rcd at 3042, para. 45.

[8] *Phase I Order*, 104, FCC Rcd at 1036.

[9] *Id.* at 1020.

[10] Plan at 2-3.

[11] AT&T Letter at 2.

[12] *Id. at p. 2, note *.*

[13] *Id. at 3.*

[14] *Id.*

[15] *Phase I Order*, 104 FCC 2d at 1038-1043. The nine CEI parameters are: interface functionality, unbundling of basic services; resale; technical characteristics; minimization of transmission costs; installation; maintenance and repair; end user access; CEI availability; and recipients of CEI.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-606

In re Applications of

LAKESHORE COMMUNICATIONS, INC.
(hereafter "Lakeshore")
Green Bay, Wisconsin
Reg: 88.5 MHz Channel 203
3 kW (H&V) 100 meters — File No. BPED-880406MK

CATHOLIC DIOCESE OF GREEN BAY (WISCONSIN)
(hereafter"CATHOLIC")
Green Bay, Wisconsin
Reg: 88.1 MHz Channel 201C
50 kW (H&V) 176.8 meters — File No. BPED-890303MB

For Construction Permit for a
Non-Commercial Educational
FM Station

CORNERSTONE COMMUNITY RADIO, INC.
(hereafter "Cornerstone")
Milladore, Wisconsin
Reg: 88.5 MHz Channel 203C1
50 kW (H&V) 178 meters — File No. BPED-890224MA

For Modification of
Facilities of Station WGNV(FM)
Milladore, Wisconsin

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station in Green Bay, Wisconsin and Cornerstone's mutually exclusive application to modify the facilities of Station WGNV(FM), Milladore, Wisconsin.

2. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Catholic has filed such statement, it is deficient. Catholic has not indicated that its general policy is to provide employment opportunity to all qualified individuals without regard to their religion or to promote the realization of equal opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to religion. Catholic has not indicated that its station employment application form will contain a notice informing prospective employees that discrimination because of religion is prohibited and of the right to notify appropriate government agencies of such discrimination. Neither has Catholic asserted that it will deal only with employment services which refer job candidates without regard to their religion. Accordingly, Catholic will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

4. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement.

5. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Catholic shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-604

In re Applications of

MARTINSVILLE COMMUNITY WORKSHOP, INC.
(hereafter: Workshop)
Martinsville, Virginia
Req: 90.5 MHz Channel 213C3
4.3 kW (H&V) 116 meters
File No. BPED-860130MG

VISION COMMUNICATIONS, INC.
(hereafter: Vision)
Roanoke, Virginia
Req: 90.3 MHz Channel 212C2
2.0 kW (H&V) 455 meters
File No. BPED-880801ME

For Construction Permit
for a New Noncommercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matter.* The Workshop and Vision applications are for different communities and different channels (213C3 and 212C2, respectively). Pursuant to 47 C.F.R. § 73.509(a), in pertinent part, applications for new noncommercial FM facilities will not be accepted if the proposed operation would involve overlap of the interfering (54 dBu) and protected (60 dBu) signal strength contours of the respective stations. The proposed facilities are 43.9 miles apart. According to our engineering analysis, the interfering contour of each applicant overlaps with the protected contour of the other. Since Vision's application was filed before the August 2, 1988 cut-off date for applications mutually exclusive with Workshop's proposal, grant of one application would effectively preclude grant of the other. Accordingly, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1948).

3. *Workshop.* Section II, Item 9 of FCC Form 340 (June 1983) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Workshop has not completed Item 9 correctly. Workshop's application gives a post office box number as the residence address for Dr. Joanne Whitley. Accordingly, Workshop must submit an amendment which gives all the information required by Section II, Item 9 to the presiding Administrative Law Judge after this Order is released.

4. *Vision.* Section 73.503(a) of the Commission's Rules mandates that an educational broadcast license may only be issued to a nonprofit educational organization and only upon a showing that the facilities will be used for the advancement of an educational program. Vision states its purpose is to be a "communications vehicle capable of reaching and educating youth and young adults of all religious denominations." There is no mention of any educational ties to any school. We find the submitted material insufficient to make a determination that Vision is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503. Accordingly, an appropriate issue will be specified.

5. Applicants for broadcast authorizations are required by Section III of Form 340 to certify that sufficient net liquid assets are on hand or that sufficient funds are available from committed resources to construct and operate requested facilities for three months without revenue. Vision responded in the negative. Vision did, however, indicate that it was "in the process of obtaining financing and will file an amendment when these efforts are completed." No such amendment was filed. Vision's response does not provide a basis to determine that it is financially qualified to be a broadcast licensee. Accordingly, an appropriate issue will be specified below.

6. *Other Matters.* None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

7. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Vision is a qualified educational organization as required by 47 C.F.R. § 73.503(a).

2. To determine with respect to Vision, whether the applicant is financially qualified.

3. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Workshop shall submit an amendment which contains the information required by Section II, Item 9 of FCC Form 340, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-442

In the Matter of

Amendment of Section 73.202(b), RM-7358
Table of Allotments,
FM Broadcast Stations.
(Oakland, Maryland)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5936 (1990), issued in response to a petition filed by Oakland Radio Station Corporation (petitioner) proposing the substitution of Channel 222A for Channel 221A at Oakland, Maryland. Petitioner also requested modification of its license for Station WXIE(FM), Channel 221A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 222A for Channel 221A at Oakland, Maryland, since it would allow Station WXIE(FM) to increase its operation to 6 kW and thereby expand its coverage area. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we are modifying petitioner's license for Station WXIE(FM), Oakland, Maryland, to specify operation on Channel 222A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Oakland, Maryland	222A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WXIE(FM), Oakland, Maryland, IS MODIFIED to specify operation on Channel 222A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WXIE(FM)'s license, BLH-3384, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-3384, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 222A are 39-26-41 and 79-31-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-451

In the Matter of

Amendment of Section 73.202(b), RM-6628
Table of Allotments,
FM Broadcast Stations.
(Keokuk and Washington, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. At the request of W. Russell Withers, Jr. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 7499 (1989), proposing the substitution of Channel 237C1 for Channel 237A at Keokuk, Iowa, and the modification of Station KOKX-FM's license to specify the higher powered channel. In order to accommodate the allotment of Channel 237C1 to Keokuk, the Commission proposed the modification of the license of Station KCII(FM), Washington, Iowa, to specify Channel 291A in lieu of its present Channel 237A. At the request of petitioner, we also proposed to delete unoccupied and unapplied-for Channel 290C2 at Keokuk. Comments were filed by the petitioner, Washington Radio, Inc. ("WRI"), licensee of Station KCII(FM), and Horizon Broadcasting, Inc. ("Horizon"), licensee of Station KXOF, Channel 292A, Bloomfield, Iowa.[1]

2. In response to the *Order to Show Cause*, WRI states that Station KCII(FM) may increase power to 6 kW on its present Channel 237A without any short-spacing problems. However, it states that if Station KCII(FM) is modified to Channel 291A, 6 kW operation might be impeded because of a short-spacing to the proposed allotment of Channel 292C3 at Bloomfield, Iowa. Therefore, in order to enable Station KCII(FM) to specify 6 kW of power on Channel 291A, WRI requests that the reference coordinates for proposed Channel 292C3 be moved approximately 1.9 miles southwest of Bloomfield. Horizon filed comments stating that it has no objection to the specification of new reference coordinates for Channel 292C3 at Bloomfield in order to enable Station KCII(FM) to operate on Channel 291A with 6 kW of power. Therefore, WRI is deemed to have consented to the modification of the license of Station KCII(FM) to specify operation on Channel 291A in lieu of its present Channel 237A.

3. We believe the public interest would be served by substituting Channel 237C1 for Channel 237A at Keokuk, Iowa, and by substituting Channel 291A for Channel 237A at Washington, Iowa, since it could provide Keokuk with an additional wide coverage area FM service. Channel 237C1 can be allotted to Keokuk in compliance with the Commission's minimum distance separation requirements and can be used at Station KOKX-FM's licensed site. Channel 291A can be allotted to Washington, Iowa, in compliance with the Commission's minimum distance separation requirements and can be used at Station KCII(FM)'s licensed site.[2] In accordance with Commission policy, petitioner will be required to reimburse WRI for the reasonable costs associated with the change in Station KCII(FM)'s license to specify operation on Channel 291A. Since no interest was expressed in use of Channel 290C2 at Keokuk, we will delete the channel as proposed.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Keokuk, Iowa	237C1, 242C2
Washington, Iowa	291A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of W. Russell Withers, Jr., for Station KOKX-FM, Keokuk, Iowa, IS MODIFIED to specify operation on Channel 237C1, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Washington Radio Inc., for Station KCII(FM), Washington, Iowa, IS MODIFIED to specify operation on Channel 291A in lieu of Channel 237A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KCII(FM)'s license, BLH-6931, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-6931, except for the chan-

nel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KCII(FM), as follows: Washington Radio, Inc., P.O. Box 524, Washington, Iowa 52353.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments reiterating its intention to apply for Channel 237C1 at Keokuk were late filed but contained a request that they be accepted *nunc pro tunc*. Horizon filed a Motion to Strike petitioner's late-filed expression of interest. Counsel to petitioner states that although he was out of town at the time comments were due, he believed that comments had been timely filed. However, petitioner urges acceptance of the late-filed comments since the proceeding is uncontested. Horizon argues that petitioner has not set forth an adequate reason why its late-filed expression of interest should be accepted. In addition, Horizon states that acceptance of petitioner's expression of interest would be prejudicial to Horizon's proposal to substitute Channel 292C3 for Channel 292A at Bloomfield, Iowa, and modification of Station KXOF-FM's license to specify the higher powered channel. *See* MM Docket 89-264, 4 FCC Rcd 4904 (1989), and counterproposals thereto.

We believe that the public interest would be served by accepting petitioner's late-filed expression of interest. Horizon previously filed comments stating that it had no objection to the allotment of Channel 291A to Washington and agreed to the specification of a new transmitter site at Bloomfield which would permit the Washington station to operate as a 6 kW Class A facility. Horizon has presented no reason why adoption of this proposal would now be prejudicial to the Bloomfield rule making. Therefore, in accordance with our policy of accepting late-filed expressions of interest in uncontested proceedings, we deny Horizon's Motion to Strike and will accept petitioner's comments for the purpose of expressing continuing interest. *See Ariton, Alabama, et al.*, 4 FCC Rcd 1182 (1989), *Santa Isabel, Puerto Rico*, 3 FCC Rcd 2366 (1988), *aff'd. Amor Family Broadcasting Group v. FCC and USA*, No. 89-1366 (D.C. Cir. November 16, 1990).

[2] The coordinates for Channel 237C1 at Keokuk are North Latitude 40-24-38 and West Longitude 91-25-57. The coordinates for Channel 291A at Washington are North Latitude 41-18-18 and West Longitude 91-42-36. Because the petition which resulted in these allotments was filed prior to October 2, 1989, the licensees of Stations KOKX-FM and KCII(FM) may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-459

In the Matter of

Amendment of Section 73.202(b), RM-7386
Table of Allotments,
FM Broadcast Stations.
(Clovis, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Alton Lloyd Finley, Jr. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6186 (1990), proposing the allotment of Channel 272C3 to Clovis, New Mexico, as the community's fifth local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 272C3 to Clovis, New Mexico, since it could provide the community with an additional local FM service. Channel 272C3 can be allotted to Clovis in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clovis, New Mexico	256C1, 260C1, 268C, 272C3, 298C1

4. The window period for filing applications will open on **March 11, 1991,** and close on **April 10, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 272C3 at Clovis are North Latitude 36-24-06 and West Longitude 103-12-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-450

In the Matter of

Amendment of Section 73.202(b), RM-7391
Table of Allotments,
FM Broadcast Stations.
(Winterset, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. At the request of AFM Associates ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6002 (1990), proposing the substitution of Channel 258C3 for Channel 258A at Winterset, Iowa, and the modification of the construction permit for Station KTDG(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 258C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 258C3 for Channel 258A at Winterset, Iowa, since it could provide the community with a wide-coverage area FM service. Channel 258C3 can be allotted to Winterset in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.7 kilometers (8.5 miles) south of the community to avoid short-spacings to Station KFGQ-FM, Channel 257A, Boone, Iowa, and to the outstanding construction permit for Channel 258A at Eldora, Iowa (BPH-880415MF).[1] As proposed, we will also modify petitioner's construction permit for Station KTDG(FM) to specify operation on the higher powered channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Winterset, Iowa	258C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of AFM Associates for Station KTDG(FM), Winterset, Iowa, IS MODIFIED to specify operation on Channel 258C3, in lieu of Channel 258A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Chanel 258C3 at Winterset are North Latitude 41-12-34 and West Longitude 94-02-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-3

In the Matter of

Amendment of Section 73.202(b), RM-7589
Table of Allotments,
FM Broadcast Stations.
(Reedsport, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 10, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Paul C. Bjornstad ("petitioner") requesting the allotment of Channel 258A to Reedsport, Oregon, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 258A to Reedsport, Oregon, since an interest has been expressed in providing the community with its second local FM service. Channel 258A can be allotted to Reedsport in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Reedsport, Oregon	221A	221A, 258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 15, 1991,** and reply comments on or before **April 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret L. Tobey, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 258A at Reedsport are North Latitude 43-42-00 and West Longitude 124-06-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-4

In the Matter of

Amendment of Section 73.202(b), RM-7588
Table of Allotments,
FM Broadcast Stations.
(Eagle Grove, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 10, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Iowa Inspirational Radio ("petitioner") requesting the allotment of Channel 264C3 to Eagle Grove, Iowa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 264C3 to Eagle Grove, Iowa, since it could provide the community with its first local FM service. Channel 264C3 can be allotted to Eagle Grove in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Eagle Grove, Iowa	--	264C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 15, 1991,** and reply comments on or before **April 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 264C3 at Eagle Grove are North Latitude 42-39-54 and West Longitude 93-54-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1504

Revisions to Tariff
F.C.C. No. 129

ORDER

Adopted: January 9, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

1. On October 15, 1990, Pacific Bell filed Transmittal No. 1504 to recover the additional cost of specially constructed facilities to provide, at the request of MCI Telecommunications Corporation, a route other than normal for existing high capacity service. On October 30, 1990, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to suspend for one day and investigate the tariff revisions. Pacific Bell filed reply comments on November 9, 1990. The tariff is scheduled to take effect on January 13, 1991.

2. MFS is concerned that Pacific Bell may be using individual case basis (ICB) special construction as a means to circumvent the prohibition on unreasonably discriminatory pricing. MFS Petition at 1-2. MFS claims that the Commission recognized this possibility in the *ICB Reconsideration Order* by requiring local exchange carriers (LECs) to justify future ICB filings.[1] *Id.* at 2-3. According to MFS, Pacific Bell has not met the strict standard for justifying a departure from averaged ratemaking. *Id.* at 3.

3. Pacific Bell responds that it has shown that the conditions for special construction have been met and that the rates are not unreasonably discriminatory. Pacific Bell Reply at 2-3. Indeed, Pacific Bell argues that customers subject to the special construction tariff pay for the specially constructed facility in addition to paying all appropriate charges under the applicable service tariff. *Id.* at 3. Pacific Bell notes that the extra charge is designed to protect the ratepayer and Pacific Bell from the risk of wasted investment if the constructed facility becomes stranded or underutilized before its full cost is recovered through service charges. *Id.* Finally, Pacific Bell contends that the *ICB Reconsideration Order* did not establish a new standard for evaluating special construction filings or even deal with DS1 facilities. *Id.* at 4.

4. The Common Carrier Bureau has reviewed Pacific Bell Transmittal No. 1504, the MFS petition, and Pacific Bell's reply. We conclude that no compelling argument has been presented that the tariff revisions warrant investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Pacific Bell Tariff F.C.C. No. 129, Transmittal No. 1504, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 4842, 4846 (1990) (*ICB Reconsideration Order*), *further recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal No. 346

Revisions to Tariff
F.C.C. No. 4

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On October 15, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 346 to establish, on an individual case basis (ICB), rate elements for a "multi-nodal, self-healing, drop and insert high capacity digital network, equipped for three digital ports." BellSouth Transmittal No. 346, Cover Letter at 1. BellSouth states that each port currently has service, but that the customer, American Transtech/UC, requested fiber optic transmission equipment that can function in a ring topology connected by alternately routed fiber optic facilities. *Id.* BellSouth claims that it will use information developed from this offering to prepare a general offering for this type of service, which it intends to file in March 1991. *Id.*

2. Advanced Telecommunications Corporation (ATC) filed a petition to reject and MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 346. BellSouth replied to both petitions. Transmittal 346 is scheduled to become effective on January 13, 1991. For the reasons discussed below, we reject Transmittal 346.

II. SUMMARY OF PLEADINGS

3. ATC, an interexchange carrier and potential customer of the self-healing network service, objects to BellSouth making the service available to only one customer at the outset, while requiring other customers to wait until BellSouth makes the service generally available. ATC Petition at 2. ATC argues that the Commission's *ICB Order* [1] prohibits DS3-type service at ICB rates. *Id.* ATC asserts that BellSouth's tariff should be rejected just as a similar "self-healing network" designed for a single customer by Southwestern Bell was recently rejected by the Common Carrier Bureau. *Id.* at 2-3. When BellSouth is ready to offer a cost-justified service on a non-discriminatory basis, says ATC, BellSouth should be allowed to offer self-healing network service. *Id.* ATC argues that the cost support provided by BellSouth is inadequate because the cost support materials do not demonstrate that the costs BellSouth cites are unique to this particular customer and does not show that generally applicable costs cannot be developed. *Id.* at 3 n.2.

4. MCI contends that BellSouth fails to provide any justification for charging ICB rates for its self-healing network service and or proof that unreasonable rate discrimination will not occur. MCI Petition at 3. MCI observes that BellSouth's proposed service is similar to a service known as "Self-Healing Network Service" (SHNS), currently offered on a general basis by US West. *Id.* at 4. MCI maintains that BellSouth, while offering the same types of functions and services as SHNS, does not explain why BellSouth's offering is so unique that generally tariffed rates are impossible to formulate. *Id.* Moreover, claims MCI, BellSouth does not explain what type of information it expects to gain from this ICB offering that precludes BellSouth from offering the service now under generally tariffed rates. *Id.* MCI further claims that BellSouth provides so little detail of the elements of the service and their costs that it is impossible to verify BellSouth's cost assumptions and assertions. *Id.* at 4 n.12.

5. In reply, BellSouth asserts that its fiber ring service provides simultaneous transmission of communications in two physically separate paths around a fiber ring and is capable of supporting simultaneous but separate communications from each node to any other node in the network. BellSouth Reply at 2. These features, says BellSouth, are not available with existing DS3 services and customers perceive that the service is distinct from DS3 services. *Id.* at 2 n.1. BellSouth, therefore, challenges the claim that it is providing redundant or additional DS3 service under the guise of an ICB arrangement, as contended by MCI. *Id.*

6. BellSouth contends that it has only limited experience with, and limited demand for, its fiber ring service. Therefore, according to BellSouth, it may offer the service at ICB rates until it is possible to formulate general rates. Formulation of such rates, it contends, requires the development of overall service and technical standards, evaluation of available equipment for suitability, and the development of a network architecture to meet current and planned technology deployment. *Id.* at 4. BellSouth further states that the instant transmittal represents a transitional ICB arrangement designed to meet a customer's request for service pending BellSouth's development of a general offering. *Id.* at 5.

7. Finally, BellSouth maintains that the filing of a general offering for fiber ring service by US West does not demonstrate that BellSouth can make a general offering of its service at this time, as MCI contends. *Id.* at 5 n.7. BellSouth argues that it must develop its own costs based upon its own service design and operating standards and must take into consideration the demand expected in its own region to calculate its general fiber ring rates. *Id.*

III. DISCUSSION

8. BellSouth Transmittal 346 contains essentially the same type of cost support data and same rate structure which Southwestern Bell filed in its Transmittal 1994, and suffers from the same deficiencies. The Common Carrier Bureau recently rejected the Southwestern Bell transmittal.[2] Like Southwestern Bell, BellSouth has failed to provide with Transmittal 346 adequate cost support to satisfy the requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Specifically, its expense data are

not sufficiently disaggregated such that the Commission can readily evaluate the rates. [3] In addition, BellSouth has failed to provide calculations to show how the proposed rates were developed, or estimates of the effects of the proposed fiber ring on other Special Access traffic and revenues.

9. Specifically, BellSouth shows total annual fully assigned recurring costs for its proposed fiber ring service of $153,275 and annual revenues of $339,552. BellSouth, however, provides no calculations to support its recurring charges, which are 122 percent higher than its recurring costs. Further, BellSouth shows fully assigned nonrecurring costs of $79,292, but recovers only $40,960 in nonrecurring charges. BellSouth states that other nonrecurring costs will be recovered in recurring rates, but provides no explanation of the methodology or calculations it uses to incorporate nonrecurring costs in its recurring charges.

10. BellSouth, to support its rates for additional ports, provides similarly deficient and unsupported information. In fact, BellSouth's cost support for additional ports appears to contradict its fiber ring rates. For example, for additional ports BellSouth shows fully assigned total annual recurring costs of $2,008 and annual recurring revenues of $2,820, or a rate that is 40 percent higher than the costs. If the same methodology was used to develop both the fiber ring rate and the additional port rate, the ratio of cost to revenue should be equal -- either 122 percent or 40 percent. In these circumstances, BellSouth's filing is deficient because it has omitted key explanations and workpapers depicting the calculations leading to the rates.

11. Moreover, BellSouth fails to address the effects that its fiber ring offering will have on other services and the effect on overall traffic and revenues. Thus, BellSouth Transmittal 346 violates Section 61.38(b)(2)(ii) of the Commission's Rules, which requires that carriers provide an explanation of the effect of new tariff matter on both new traffic and revenues and on existing services' traffic and revenues, including the effect on the carrier's overall traffic and revenues.

12. In sum, the cost support supplied with Transmittal 346 is devoid of the information necessary to determine whether an investigation or suspension of the transmittal is warranted pursuant to Section 204 of the Communications Act, 47 U.S.C. § 204. The tools required for the Commission to carry out its statutory mandate with respect to evaluating tariff filings are contained in Section 61.38 and BellSouth, by this filing, deprives us of the instruments that we need to fulfill our responsibilities under the Communications Act. This violation of the requirements of Section 61.38 forces us to conclude that the transmittal does not comply with applicable Commission rules. Therefore, we reject Transmittal No. 346.[4]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 346, IS REJECTED.

14. IT IS FURTHER ORDERED that BellSouth Telephone Companies SHALL ISSUE revisions to the tariff not later than five business days from the date of the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on not less than one day's notice.

15. IT IS FURTHER ORDERED that Special Permission No. 91-018 IS ASSIGNED and Sections 61.58 and 61.59, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revision.

16. IT IS FURTHER ORDERED that the petition to reject Transmittal No. 346 filed by Advanced Telecommunications Corporation IS GRANTED, and the petition to suspend and investigate Transmittal 346 filed by MCI Telecommunications Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order*).

[2] Southwestern Bell Telephone Co., Revisions to Tariff F.C.C. No. 68, Transmittal No. 1994, Memorandum Opinion and Order, 5 FCC Rcd 5980 (Com.Car.Bur. 1990).

[3] For instance, BellSouth's expenses are not displayed in a format that reflects capital expenses (*e.g.*, cost of money, depreciation, and income tax) and other expenses (*e.g.*, maintenance, administration, and general overhead expenses).

[4] We need not address whether BellSouth's fiber ring service is not "like" any of its existing services, and thus eligible for ICB treatment on a transitional basis, since we are rejecting the service for lack of cost support.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company	Transmittal Nos. 2655, 2664, 2665, and 2749

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 11, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2655, 2664, 2665, and 2749 to introduce Virtual Telecommunications Network Service (VTNS) Options 74, 75, and 76, by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Option 74 are stabilized for a five-year term with a one-year extension if the customer opts for such extension and AT&T agrees. The rates for Option 75 are stabilized for a three-year term with a one-year extension if the customer opts for such extension and AT&T agrees. The rates for Option 76 are stabilized for a three-year term. *See* AT&T Transmittal No. 2655 Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2664 D&J at 1-4; AT&T Transmittal No. 2665 D&J at 1-4. The basic charge for Option 74 is $109,900 per month. It will be reduced by $10,000 for the first full month of service after the initial service date. The basic charge for Option 75 is $310,081 per month. It will be reduced by $86,630 per month for four full months following the initial service date. The basic charge for Option 76 is $419,500 per month. *See* AT&T Transmittal No. 2655 D&J at 5; AT&T Transmittal No. 2664 D&J at 5; AT&T Transmittal No. 2665 D&J at 5. Transmittal Nos. 2655, 2664, 2665, and 2749 are scheduled to become effective January 12, 1991.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal No. 2665 on November 5, 1990, and Transmittal Nos. 2664 and 2665 on November 8, 1990. MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend Transmittal No. 2655 on November 5, 1990, and Transmittal No. 2665 on November 9, 1990. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate Transmittal No. 2655 on November 6, 1990, Transmittal No. 2664 on November 7, 1990, and Transmittal No. 2665 on November 9, 1990. AT&T filed a reply to the petitions against Transmittal No. 2655 on November 16, 1990, Transmittal No. 2664 on November 19, 1990, and Transmittal No. 2665 on November 21, 1990.

3. Sprint contends that Options 74 through 76 raise the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand Order* [1] and thus must be reviewed in light of the remand. Sprint Option 74 Petition at 3-4; Sprint Options 75 and 76 Petition at 3-4. Sprint argues that AT&T has failed to demonstrate that Options 74 through 76 are integrated service packages that are "unlike" their component services and thus has failed to justify the discrimination between these options and AT&T's other services. Sprint Option 74 Petition at 4-6; Sprint Options 75 and 76 Petition at 4-6. Further, Sprint contends that even if Options 74 through 76 could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and are thus discriminatory. Sprint Option 74 Petition at 6-7; Sprint Options 75 and 76 Petition at 7-8. Sprint also argues that Options 74 through 76 impermissibly bundle 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. Sprint Option 74 Petition at 8-9; Sprint Options 75 and 76 Petition at 8-9. Sprint also alleges that AT&T provides no justification in its cost support that the rates, terms, and conditions for Options 74 through 76 are reasonable, or that they are not unreasonably discriminatory. Sprint Option 74 Petition at 9; Sprint Options 75 and 76 Petition at 9.

4. MCI also maintains that Options 74 and 76 raise the same issues as the options remanded in the *Tariff 12 Remand Order* and must be reviewed in light of that Order. MCI Option 74 Petition at 2; MCI Option 76 Petition at 2. MCI contends that Options 74 and 76 are comprised of constituent offerings that are available under standard AT&T tariffs and under other Tariff 12 service arrangements, and that AT&T has not provided adequate cost support as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify price differences between or among these services. Thus, MCI argues, there are no bases to compare the charges actually assessed under these offerings or to ascertain whether a neutral, rational basis underlies these pricing differences. MCI Option 74 Petition at 2-4 & 4 n.5; MCI Option 76 Petition at 2-4 & 4 n.4. MCI also claims that Tariff 12 unlawfully bundles AT&T's 800 Service with AT&T services that are subject to greater competition. MCI Option 74 Petition at 3 n.4; MCI Option 76 Petition at 3-4.

5. Williams contends that Options 74 through 76 are unreasonably discriminatory because, except for their lower prices, they are like the component services in other AT&T tariffs. Williams alleges that AT&T has provided no justification for the rate disparities between these options and AT&T's standard tariffs. Williams Option 74 Petition at 2-9; Williams Option 75 Petition at 2-10; Williams Option 76 Petition at 2-9. Williams also contends that the rates for Options 74 through 76 are unlawfully discriminatory when compared to other Tariff 12 options. Williams Option 74 Petition at 9-12; Williams Option 75 Petition at 10-13; Williams Option 76 Petition at 10-13. In addition, Williams argues that Tariff 12 options are not generally available because it is unrealistic to expect another customer to have the same network needs as the original option customer. Williams Option 74 Petition at 12-14; Williams Option 75 Petition at 13-15; Williams Option 76 Petition at 13-14. Williams also alleges that AT&T's cost support is inadequate. Williams Option 74 Petition at 14; Williams Option 75 Petition at 15-16; Williams Option 76 Petition at 15-16. Williams further

claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Option 74 Petition at 15; Williams Option 75 Petition at 17; Williams Option 76 Petition at 17. Williams also contends that the bundling of AT&T's 800 Service with other Tariff 12 services in Options 75 through 76 precludes competition, thereby enabling AT&T to capture the bulk of large customers' other interexchange needs. Williams Option 75 Petition at 19-20; Williams Option 76 Petition at 19-20.

6. In addition, Williams contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Options 74 through 76 take effect. Williams Option 74 Petition at 18-20; Williams Option 75 Petition at 22-24; Williams Option 76 Petition at 22-24. Williams alleges that even the Tariff 12 customers could benefit from such a procedure because if Tariff 12 is found to be a system of unlawful preferences, the Tariff 12 customers could be liable to the Federal Government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). Williams Option 75 Petition at 24-25; Williams Option 76 Petition at 24-26. Williams also contends that the Tariff 12 customers would also be liable to AT&T for the difference between the general tariff rates and the Tariff 12 rates. Williams Option 76 Petition at 24 n.28.

7. AT&T replies that the *Tariff 12 Remand Order* creates no basis to reject or suspend VTNS offerings. AT&T argues that the decision did not call into question the lawfulness of Tariff 12, but rather remanded on the technical ground that the Commission had not "turn[ed] square corners of administrative law" in terminating the investigation of the initial options. AT&T Option 74 Reply at 3-6; AT&T Option 75 Reply at 3-6; AT&T Option 76 Reply at 3-6. AT&T asserts that the rates in Options 74 through 76 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. AT&T further claims that since Tariff 12 options are not "like" a combination of separately tariffed services, the options are not a "bundling" of separate services and thus the Commission decisions on which petitioners rely are inapposite. AT&T Option 74 Reply at 6-9; AT&T Option 75 Reply at 6-10; AT&T Option 76 Reply at 6-10. In addition, AT&T contends that there is no unreasonable discrimination between the rates in Options 74 through 76 and rates in other VTNS options. AT&T asserts that Tariff 12 options are generally available and claims that a number of options have multiple, unaffiliated customers. AT&T also argues that the general availability requirement assures compliance with the Commission's resale and sharing rules. AT&T Option 74 Reply at 10 & n.*; AT&T Option 75 Reply at 10-11 and 11 n.*; AT&T Option 76 Reply at 10-11 and 11 n.*. AT&T also contends that its cost support fully satisfies Section 61.38 of the Commission's Rules. AT&T Option 74 Reply at 16-17; AT&T Option 75 Reply at 15-17; AT&T Option 76 Reply at 16-18.

8. In addition, AT&T contends that existing Tariff 12 customers are not liable for damages under Section 503(a) of the Communications Act. AT&T asserts that the provision is facially inapplicable because it deals with a "rebate" of tariffed charges and every Tariff 12 customer pays charges precisely as specified in the tariff. AT&T Option 75 Reply at 17 n.*; AT&T Option 76 Reply at 18 n.*. AT&T contends that the cases cited by Williams all involve payments *not* specified in any tariff and they make clear that a customer's payment of an effective tariffed rate can never constitute the acceptance of a rebate. AT&T asserts that the cases state that an honest and reasonable belief that an offset is authorized by the tariff is a defense to a treble forfeiture even if the offset is later found not to be authorized by the applicable tariff. AT&T Option 76 Reply at 18 n.*.

9. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2655, 2664, 2665, and 2749, the petitions filed by Sprint, MCI, and Williams, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

10. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2655, 2664, 2665, and 2749 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

11. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2655, 2664, and 2665 filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corporation, and Williams Telecommunications Group, Inc., ARE DENIED.

12. IT IS FURTHER ORDERED that Transmittal Nos. 2655, 2664, 2665, and 2749 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990) (*Tariff 12 Remand Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2691 and 2695

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 14, 1991; Released: January 15, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2691 and 2695 to modify Virtual Telecommunications Network Service (VTNS) Options 14 and 12, respectively, by which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Transmittal Nos. 2691 and 2695 are scheduled to become effective January 16, 1991.

2. The tariff revisions to Option 14 add the ability to add or delete network components for data transmission capabilities (DTCs); separate the DTCs included in the basic charge by access and network components; reduce the basic charge from $613,000 per month to $558,815 per month; reduce the minimum annual charge from $31,750,000 to $30,664,000; revise rate schedules A through D to reflect reduced rates; adjust change charge rates; add change charge rates for the additional service elements; add the additional service elements to the domestic DTC volume pricing plan; and eliminate certain option-specific regulations. The modified rates are designed to encourage customer use above the levels required to meet the minimum commitments. *See* AT&T Transmittal No. 2691 Description and Justification (D&J) at 2-9.

3. The tariff revisions to Option 12 add the ability to place international calls, to add DTCs at various additional speeds, and to add measured ports; modify the basic charge by introducing a one-month promotional reduction of $68,690 for the first full month of service within six months of the effective date of these tariffs revisions and by changing the service elements included in the basic charge; increase the minimum annual charge from $10,000,000 to $11,250,000; introduce an international usage volume pricing plan; introduce an international DTC, voice transmission capability (VTC), and satellite transmission capability (STC) volume pricing plan; waive installation charges under certain conditions; and eliminate option-specific regulations for network prompter service. According to AT&T, the modified rates and regulations are designed to be responsive to the needs of customers and to encourage customer use above the levels required to meet the minimum commitments. *See* AT&T Transmittal No. 2695 D&J at 2-9.

4. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate the modifications to Option 14 on November 19, 1990, and the modifications to Option 12 on November 20, 1990. AT&T filed a reply to the petition against the Option 14 modifications on November 30, 1990, and to the petition against the Option 12 modifications on December 3, 1990.

5. Williams contends that the *Tariff 12 Remand* [1] completely undermines the rationale for allowing AT&T to file new or modified Tariff 12 options without meaningful Commission review. Williams Option 14 Petition at 2; Williams Option 12 Petition at 2-3. Williams claims that modified Options 14 and 12 are unreasonably discriminatory because, except for their lower prices, they are like the component services in other AT&T tariffs. Williams alleges that AT&T has provided no justification for the rate disparities between these options and AT&T's standard tariffs. Williams Option 14 Petition at 2-13; Williams Option 12 Petition at 5-14. Williams further argues that the rate modifications in Options 14 and 12 cannot be justified even partially by competitive necessity, as AT&T implies, because competitors are effectively precluded from competing for the services in these options. In support, Williams cites AT&T's statement that the modifications are expected to have no impact on AT&T's other services because, absent this filing, all current customer demand for the service functionalities provided by Options 14 and 12 would continue to be met under VTNS. Williams Option 14 Petition at 13; Williams Option 12 Petition at 14.

6. In addition, Williams contends that the rates for modified Options 14 and 12 are unlawfully discriminatory when compared to other Tariff 12 options. Williams Option 14 Petition at 13-17; Williams Option 12 Petition at 15-17. Williams argues that Tariff 12 options are not generally available because it is unrealistic to expect another customer to have the same network needs as the original option customer. Williams Option 14 Petition at 17-19; Williams Option 12 Petition at 18-20. Williams also alleges that AT&T's cost support is inadequate. Williams Option 14 Petition at 19-21; Williams Option 12 Petition at 20-21. Additionally, Williams claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Option 14 Petition at 21-22; Williams Option 12 Petition at 21.

7. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if modified Options 14 and 12 take effect. Williams Option 14 Petition at 25-28; Williams Option 12 Petition at 24-26. Williams alleges that even the Tariff 12 customers could benefit from such a procedure because if Tariff 12 is found to be a system of unlawful preferences, the Tariff 12 customers could be liable to the federal government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). Williams Option 14 Petition at 28-29; Williams Option 12 Petition at 3-4, 27-28. Additionally, Williams alleges that AT&T's proposal to forgive cancellation charges which the Option 12 customers would otherwise be required to pay under existing tariffs constitutes a rebate in violation of Section 503(a) of the Communications Act. Williams charges that this also violates Section 202(a) of the Com-

munications Act because it bestows an unreasonable preference on selected customers. Williams Option 12 Petition at 3-5.

8. AT&T replies that the *Tariff 12 Remand* creates no basis to reject or suspend VTNS offerings. AT&T Option 14 Reply at 2-5; AT&T Option 12 Reply at 2-5. In addition, AT&T contends that there is no unreasonable discrimination between the rates in Options 14 and 12 and rates in other VTNS options. AT&T Option 14 Reply at 5-7; AT&T Option 12 Reply at 5-6. Additionally, AT&T contends that its cost support fully satisfies Section 61.38 of the Commission's Rules. AT&T Option 14 Reply at 7-8; AT&T Option 12 Reply at 7.

9. AT&T also contends that existing Tariff 12 customers are not liable for damages under Section 503(a) of the Communications Act for obtaining service under Tariff 12. AT&T Option 14 Reply at 9-10 & 9 n.*; AT&T Option 12 Reply at 8-9 & 9 n.*. AT&T further asserts that existing AT&T customers who switch to Tariff 12 are not liable for damages under Section 503(a) as a result of AT&T's waiver of termination charges because its tariffs expressly and lawfully waive termination charges if a customer orders another AT&T service with equal or greater revenue commitment and term length. Finally, AT&T argues that the waiver of such termination charges does not constitute unreasonable discrimination under Section 202(a) of the Communications Act because all similarly situated customers may avail themselves of these tariffed waiver provisions. AT&T Option 12 Reply at 8 n.*.

10. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2691 and 2695, the petitions filed by Williams, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

11. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2691 and 2695 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

12. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2691 and 2695, filed by Williams Telecommunications Group, Inc., ARE DENIED.

13. IT IS FURTHER ORDERED that Transmittal Nos. 2691 and 2695 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir., Oct. 23, 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION	File No. I-T-C-89-119
Application for authority to implement a dual satellite system to provide channels of communication via the INMARSAT system.	
Application for authority to construct and operate a 1.8-meter L-band earth station at its Southbury, Connecticut communication-satellite coast earth station complex.	File No. CSG-89-104-P/L
Application for authority to construct and operate a 1.2-meter L-Band earth station at its Santa Paula, California communication satellite coast earth station complex.	File No. CSG-89-068-P/L CSG-89-068-P/L(A)

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 22, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed on April 6 and June 19, 1989, and supplemented on June 19 and July 19, 1989, by the Communications Satellite Corporation (Comsat), request authority pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act, and Section 214 and Title III of the Communications Act of 1934, as amended, to implement a dual satellite system for the provision of International Maritime Satellite Organization (INMARSAT) services in the Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR); construct and operate a 1.8-meter L-band antenna and associated equipment at its Southbury, Connecticut (WA-28) communication-satellite coast earth station complex; and to construct and operate a 1.2-meter L-band antenna and associated equipment at its Santa Paula, California (KA-31) communication-satellite coast earth station complex for use with the INMARSAT dual satellite system. The applications were placed on public notice on April 19, June 28, and June 30, 1989. No comments were received.

2. The proposed international earth station facilities at Southbury, Connecticut will consist of a 1.8-meter (Andersen Manufacturing, Inc.) antenna which will operate in the 1635.5-1645.0 MHz transmitting frequency band and in the 1535.0-1543.5 MHz receiving frequency band and will be used for testing and communications services through the INMARSAT AOR satellites located between 14^0 and 60^0 West Longitude and the various INMARSAT coast earth stations in the AOR, as well as with the co-located Southbury, Connecticut communication-satellite coast earth station complex. The proposed earth station conforms with INMARSAT Standard A technical parameters. The maximum effective isotropic radiated power density shall not exceed 36.2 dBW/4kHz and emissions shall be limited to 24K0F3E and 4K80G2D for transmit and 2K40G1D and 24K0F3E for receive.

3. Comsat also proposes to construct and operate a 1.2-meter L-band antenna and associated equipment at its Santa Paula, California communication-satellite coast earth station complex. Comsat states that it has transferred its INMARSAT Standard A ship earth station (Scientific Atlanta Model 3052) from Washington, D.C. to its Santa Paula, California coast earth station complex. Comsat proposes to operate the 1.2-meter antenna in the 1635.5-1645.0 MHz transmitting frequency band and in the 1535.0-1543.5 MHz receiving frequency band with the INMARSAT POR satellites located between 172^0 and 184^0 West Longitude and the various INMARSAT coast earth stations in the POR, as well as with the co-located Santa Paula complex (KA-31) communications facilities. The proposed earth station conforms with INMARSAT Standard A technical parameters. The maximum effective isotropic radiated power density shall not exceed 36.2 dBW/4kHz and emissions shall be limited to 24K0F3E and 4K80G2D for transmit and 2K40G1D and 24K0F3E for receive.

4. The above facilities will be used to implement the dual satellite system which INMARSAT is proposing for provision of maritime mobile-satellite services in both the AOR and POR. Comsat states that present traffic growth indicates that the AOR satellite, MARECS-B2 located at 26^0 West Longitude, will reach saturation by July 1989; and that the POR satellite, the Maritime Communications Package of the INTELSAT V (MCS-D) located at 180^0 West Longitude, should also reach saturation during the third quarter of 1989. The earliest possible launch date for second generation satellites would be mid-1990 for the AOR and late 1990 for the POR. INMARSAT was leasing the MCS-B satellite at 18.5^0 West Longitude from INTELSAT as an AOR in-orbit spare, and was using the MARECS-A satellite at 178^0 East Longitude as a spare in the POR. Comsat now proposes to use all four satellites to alleviate possible saturation.

5. Comsat plans to use two satellites in each ocean region as a network, and to space them as close together as possible so that ship earth stations do not have to discriminate between the two satellites. Comsat states that capacity will be increased by approximately 25% in the AOR and 75% in the POR. According to Comsat, these plans necessitate installation of additional L-band facilities at the Southbury, Connecticut and Santa Paula, California communication-satellite coast earth station complexes. Comsat states that this arrangement will allow INMARSAT extra time to get its second generation sat-

ellites up and working. Comsat's legal, technical and financial qualifications to operate the proposed earth stations are established.

6. Upon consideration of the applications, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-119, CSG-89-104-P/L, and CSG-89-068-P/L(A), as amended, ARE GRANTED, and Comsat is authorized to:

a. implement an INMARSAT dual satellite system in the AOR and POR utilizing the MCS-B and MARECS-B2 satellites in the AOR and the MCS-D and MARECS-A satellites in the POR;

b. construct and operate a 1.8-meter L-band antenna and associated equipment at its Southbury, Connecticut communication-satellite coast earth station complex;

c. construct and operate a 1.2 meter L-band antenna and associated equipment at its Santa Paula, California communication-satellite coast earth station complex; and

d. use these facilities to provide international maritime mobile satellite services, provided, however, that Comsat shall file with the Commission a report of equipment which was actually installed upon completion of construction.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BLACK TELEVISION
WORKSHOP OF
LOS ANGELES, INC.
(Assignor)

and

HISPANIC CHRISTIAN
COMMUNICATIONS
NETWORK
(Assignee)

For Assignment of Construction
Permit for Noncommercial
Educational Station KEEF-TV,
Los Angeles, California

In re Application of

HISPANIC CHRISTIAN
COMMUNICATIONS NETWORK

For Interim Operating Authority of
Noncommercial Educational
Station KEEF-TV,
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 22, 1991

By the Commission:

1. The Commission has before it for consideration: (a) a *Memorandum Opinion and Order*, 5 FCC Rcd 2901 (1990) (" *MO&O*"), upholding a Mass Media Bureau decision dismissing an application for the assignment of the construction permit of Noncommercial Educational Station KEEF-TV, Los Angeles, California, from Black Television Workshop of Los Angeles, Inc. ("BTW") to Hispanic Christian Communications Network ("HCCN"); (b) a Petition for Reconsideration of the *MO&O*, jointly filed by BTW and HCCN ("Petitioners") on June 5, 1990; (c) a Supplement to Petition for Reconsideration, jointly filed by BTW and HCCN on July 6, 1990; (d) an Opposition to the Supplement to Petition for Reconsideration, filed by Mary Woodfork ("Woodfork"), on August 9, 1990; (e) a Reply to Opposition, filed by BTW on August 20, 1990; (f) a Reply to Opposition, filed by HCCN on August 23, 1990; and (g) a Request for Interim Operating Authority, filed by HCCN on May 24, 1990.

BACKGROUND

2. In 1988, a proceeding (MM Docket No. 88-420) was commenced to determine whether the construction permit for KEEF-TV should be revoked. *Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability*, 3 FCC Rcd 5443 (1988) (" *HDO* "). The *HDO* specified issues to determine, *inter alia*, whether control of the permittee had been transferred without Commission approval, in violation of Section 310(d) of the Communications Act of 1934, as amended. The order to show cause arose out of a dispute over control of KEEF-TV between Woodfork, an original member of BTW's board of directors, and Booker T. Wade Jr. ("Wade"), the current president of BTW.

3. The hearing was scheduled to commence in Los Angeles on March 27, 1989. However, the proceeding was stayed, pursuant to the then-prevailing language of Section 1.245(b)(4) of the Commission's Rules, pending our consideration of BTW's request to disqualify the Presiding Judge. Thus, the hearing has not yet commenced.

4. After the stay was imposed, BTW sought to assign the KEEF-TV construction permit to HCCN, pursuant to the Commission's *Minority Distress Sale Policy*.[1] However, in the above referenced *MO&O*, we upheld the Mass Media Bureau's denial of the proposed assignment because the *Minority Distress Sale Policy* had been declared unconstitutional by the United States Court of Appeals for the District of Columbia Circuit in the case of *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). We determined that, based on the Court of Appeals decision, this agency was barred by law from granting the assignment application. 5 FCC Rcd at 2901.

5. In their Petition for Reconsideration of the *MO&O*, BTW and HCCN requested that the Commission withhold action on the proposed distress sale until the United States Supreme Court had the opportunity to review the lower court's decision in *Shurberg*. While the Petition for Reconsideration was pending, the Supreme Court reversed the lower court, thereby reinstating the Commission's *Minority Distress Sale Policy*.[2] In light of this development, Petitioners have filed the referenced Supplement to Petition for Reconsideration, wherein they renew their request for favorable action on the subject assignment application.

6. Woodfork maintains that the proposed sale of KEEF-TV should not be approved until the Commission determines through a hearing who has the lawful authority to act on behalf of BTW. BTW contends that a hearing is unnecessary because, with the exception of Woodfork, all of the original members of BTW's board of directors have signed a resolution supporting the proposed sale of KEEF-TV. Thus, BTW maintains that Woodfork is simply outvoted. BTW also denies Woodfork's allegation that it coerced the other board members into acquiescing to the proposed sale.

7. After the stay of the revocation proceeding was imposed, HCCN also requested authority to operate KEEF-TV on an interim basis. In its May 24, 1989, request, HCCN acknowledged that interim operating authority ordinarily is permitted only in situations, unlike that here, in which a station's license has already been revoked. Nevertheless, HCCN argued that there is "no regulatory or statutory prohibition" to its request. HCCN also asserted that because it is not a party to the revocation proceeding, it will not benefit in any way if it receives authority to operate KEEF-TV on an interim basis.

DISCUSSION

8. Based on the facts presented, we will deny Woodfork's opposition to the proposed distress sale of KEEF-TV. Woodfork stands as the only original member of BTW's board of directors who opposes the distress sale. All of the other original members have signed a resolution supporting the transaction. Because we find that there is no evidence to support Woodfork's claim that the board members who signed the resolution were coerced into doing so, we believe that the resolution constitutes a *bona fide* expression of the permittee's intent, which is to assign the construction permit for KEEF-TV to HCCN, pursuant to the Commission's *Minority Distress Sale Policy*.

9. Moreover, there exist significant and compelling public interest reasons for considering the merits of the instant distress sale application. Not only would the distress sale, if ultimately approved by the staff, further the Commission's goal of increasing minority participation in the broadcast medium, it would expedite the inauguration of a new, noncommercial, educational UHF television service in Los Angeles, one of the nation's most densely populated areas.

10. A distress sale, by its very nature, avoids the need for a hearing. Accordingly, we need not reach a decision on the issue of whether an unauthorized transfer of control was effected.

11. Although our action herein directs the Chief, Mass Media Bureau, to consider the above-captioned distress sale application, we note that there exist two impediments to an immediate grant. The first impediment relates to the sales price. We note that under our distress sale policy, a licensee of a constructed and operating station is entitled to receive up to 75% of the fair market value of the station. While BTW proposes such a price, the facts here do not fall squarely within the contours of the traditional distress sale case. Pursuant to Section 73.3597(c)(2) of the Commission's Rules, the Commission will not consent to the assignment or transfer of control of a construction permit of an unbuilt station (i.e., a station that has not commenced program tests) if the agreements or understandings between the parties provide for, or permit, payment to the seller of a sum "in excess of the aggregate amount clearly shown to have been expended by the seller, solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation." Although BTW constructed and briefly conducted program tests, it did not construct in compliance with the facilities authorized in its construction permit, and, therefore, it had no authority to conduct such tests. *See Letter from Roderick K. Porter, Deputy Chief, Mass Media Bureau*, dated August 11, 1987, Ref. 8940-MLB.

12. In light of BTW's failure to construct in accordance with its permit, a serious question thus arises whether KEEF-TV must be treated as an unbuilt station for purposes of Section 73.3597 and, therefore, whether BTW should be limited to payments that do not exceed its reasonable and prudent expenses. If KEEF-TV is treated as an unbuilt station, then, consistent with our distress sale policy, the price of the distress sale arguably should be limited to 75% of reasonable and prudent expenses. In these unusual circumstances, however, we think it unnecessary to limit the sales price so severely. The deterrence objective underlying the distress sale policy can be adequately achieved in this case by adhering to a strict interpretation of Section 73.3597(c)(2) and treating KEEF-TV as an unbuilt station. Therefore, taking into account all the circumstances in this case of first impression, we believe the result most consistent with the goals of our distress sale policy would be to limit BTW to recovery of its reasonable and prudent expenses. Accordingly, the instant application cannot be granted at this time.

13. The second impediment to the immediate grant of the distress sale application is that the construction permit for KEEF-TV contemplates operation on Channel 68, a channel reserved for a noncommercial educational facility. However, HCCN has failed to indicate adequately that it will operate KEEF-TV on a noncommercial educational basis. Although HCCN, on July 20, 1989, amended Section II of the assignment application to provide additional information about its governing board, it failed to provide a proposed weekly schedule of programs which would clearly demonstrate its educational intent and purpose. Therefore, we are unable to determine whether HCCN is qualified to operate on this reserved channel. *Way of the Cross of Utah, Inc.*, 58 RR 2d 455 (1984).

14. Finally, given our decision directing the Bureau to consider the instant application, which contemplates an assignment of construction permit to HCCN, it is unnecessary to render a decision on HCCN's request to operate KEEF-TV on an interim basis. According, HCCN's request for interim operating authority will be dismissed as moot.

15. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration, filed June 5, 1990, and the Supplement thereto, filed July 6, 1990, jointly by BTW and HCCN, ARE HEREBY GRANTED.

16. IT IS FURTHER ORDERED, that the Chief, Mass Media Bureau, is HEREBY DIRECTED TO CONSIDER THE ABOVE CAPTIONED DISTRESS SALE APPLICATION in a manner consistent with our concerns expressed hereinabove.

17. IT IS FURTHER ORDERED, that the Request for Interim Operating Authority, filed May 24, 1989, by HCCN, IS HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978).

[2] *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 2997 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 67 (new Part 36)
of the Commission's Rules and
Establishment of a Federal-State
Joint Board

ORDER

Adopted: January 8, 1991; Released: January 22, 1991

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), we hereby appoint The Honorable Dennis J. Nagel, Chairperson of the Iowa Utilities Board, to the Federal-State Joint Board in CC Docket No. 80-286. On November 13, 1990, the National Association of Regulatory Utility Commissioners nominated Chairperson Nagel to fill a vacancy on this Joint Board. This vacancy was created by Colorado PUC Commissioner Ronald L. Lehr's October 31, 1990 resignation from the Joint Board. Henceforth a copy of all filings in these proceedings shall be served on Chairperson Nagel at the following address:

The Honorable Dennis J. Nagel
Chairperson
Iowa Utilities Board
Lucas State Office Building
Des Moines, Iowa 50319

2. Accordingly, IT IS ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), that Dennis J. Nagel will serve as a member of the Federal-State Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-454

In the Matter of

Amendment of Section 73.202(b), RM-7436
Table of Allotments,
FM Broadcast Stations.
(Clearwater, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6197 (1990), issued in response to a petition filed by Central K Communications ("petitioner"). The *Notice* proposed the allotment of FM Channel 254A to Clearwater, Kansas, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 254A to Clearwater, Kansas, since it could provide the community with its first FM broadcast service. Channel 254A can be allotted to Clearwater, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 7.3 kilometers (4.5 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station KBUZ, Channel 256C1, El Dorado, Kansas.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Clearwater, Kansas	254A

4. The window period for filing applications for Channel 254A at Clearwater will open on **March 12, 1991,** and close on **April 11, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 254A are 37-27-21 and 97-33-48.

[2] Station KBUZ was upgraded from Channel 256C2 to Channel 256C1 in MM Docket 89-476, effective June 30, 1990. *See* 5 FCC Rcd 3517 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-496

In the Matter of

Amendment of Section 73.202(b), RM-6971
Table of Allotments,
FM Broadcast Stations.
(Georgetown and Myrtle Beach,
South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Coastline Communications of Carolina, Inc. ("petitioner"), licensee of Station WBPR, Channel 249C2, Georgetown, South Carolina, the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8117 (1989), proposing the reallotment of Channel 249C2 to Myrtle Beach, South Carolina, and the modification of Station WBPR's license to specify Myrtle Beach as its community of license. Comments were filed by petitioner and Pinnacle Southeast, Inc., licensee of Station WYAV, Channel 281C1, Conway, South Carolina. Petitioner subsequently filed a request for withdrawal of its petition.[1] We will grant petitioner's request.

2. Accordingly, IT IS ORDERED, That the petition for rule making (RM-6971) of Coastline Communications of Carolina, Inc., to reallot Channel 249C2 from Georgetown to Myrtle Beach, and to modify its license for Station WBPR accordingly, IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner submitted a statement that it has not received or been promised any consideration for the withdrawal of the petition for rule making.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-461

In the Matter of

Amendment of Section 73.202(b), RM-7376
Table of Allotments,
FM Broadcast Stations.
(Gardnerville-Minden, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Carson Valley Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6246 (1990), proposing the substitution of Channel 256C3 for Channel 257A at Gardnerville-Minden, Nevada, and the modification of the license for Station KGVM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 256C3 for Channel 257A at Gardnerville-Minden, Nevada, since it would provide the community with a wide coverage area FM service. Channel 256C3 can be allotted to Gardnerville-Minden in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, we will also modify petitioner's license for Station KGVM to specify operation on Channel 256C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gardnerville-Minden, Nevada	256C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Carson Valley Radio, Inc., for Station KGVM, Gardnerville-Minden, Nevada, IS MODIFIED to specify operation on Channel 256C3, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 256C3 at Gardnerville-Minden are North Latitude 38-56-24 and West Longitude 119-45-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-439

In the Matter of

Amendment of Section 73.202(b), RM-7324
Table of Allotments,
FM Broadcast Stations.
(Cave City, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5818 (1990), issued in response to a petition for rule making filed by Steven W. Newberry ("petitioner"), licensee of Station WHHT(FM), Channel 279A, Cave City, Kentucky, proposing the substitution of Channel 279C3 for Channel 279A at Cave City and modification of his license to specify the higher powered channel. Newberry Broadcasting, Inc.,[1] licensee of Station WHHT(FM), filed comments stating its intention to apply for Channel 279C3, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 279C3 for Channel 279A at Cave City, since it could provide a wide coverage area FM service to the community. Channel 279C3 can be allotted to Cave City in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.2 kilometers (10.7 miles) south[2] of the community in order to avoid a short-spacing to vacant Channel 280A at Drakesboro, Kentucky. We will modify the license of Station WHHT(FM) to specify operation on Channel 279C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Cave City, Kentucky	279C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WHHT(FM), Cave City, Kentucky, IS MODIFIED to specify operation on Channel 279C3 in lieu of Channel 279A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Newberry Broadcasting, Inc., became licensee of Station WHHT(FM) on March 17, 1989.

[2] The coordinates for Channel 279C3 at Cave City are North Latitude 36-59-39 and West Longitude 86-01-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-473

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Edenton and Scotland Neck, North Carolina) — RM-7392

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Lawrence F. and Margaret A. Loesch ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6293 (1990), proposing the substitution of Channel 273C2 for Channel 272A at Edenton, North Carolina, and the modification of their license for Station WZBO-FM to specify operation on the higher powered channel. In addition, the *Notice* proposed the substitution of Channel 238A for Channel 274A at Scotland Neck, North Carolina, and the modification of Station WWRT's construction permit to specify the alternate Class A channel. Comments were filed by the petitioners and WYAL Radio, Inc., licensee of Station WWRT.

2. Petitioners reiterate their intention to apply for Channel 273C2, if allotted to Edenton, and state their willingness to reimburse WYAL Radio, Inc., for the reasonable costs associated with the change in channel for Station WWRT. WYAL Radio, Inc., states its agreement to the modification of Station WWRT's construction permit to specify Channel 238A, noting that the channel can be used at the transmitter sites specified in both the station's construction permit and its pending application (BMPH-891002IP).

3. We believe the public interest would be served by substituting Channel 273C2 for Channel 272A at Edenton, North Carolina, and substituting Channel 238A for Channel 274A at Scotland Neck, North Carolina, since it could provide Edenton with an additional wide coverage area FM service. Channel 273C2 can be allotted to Edenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) southeast to avoid a short-spacing to Station WHLQ, Channel 273A, Louisburg, North Carolina, and to accommodate petitioner's desired transmitter site. Channel 238A can be allotted to Scotland Neck and can be used at the site specified in Station WWRT's outstanding construction permit.[1]

4. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify the license of Station WZBO-FM to specify operation on Channel 273C2. Additionally, the petitioners will be required to reimburse WYAL Radio, Inc., for the reasonable costs associated with the change in channel for Station WWRT. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). As stated in the *Notice*, if the proposal of LBS Broadcasting, Inc., to substitute Channel 274C1 for Channel 274B at Appomattox, Virginia, by substituting Channel 238A for Channel 274A at Scotland Neck (RM-7299), is ultimately granted, LBS Broadcasting, Inc., will be required to share in the reimbursement costs for Station WWRT.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Edenton, North Carolina	261C2, 273C2
Scotland Neck, North Carolina	238A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Lawrence F. and Margaret A. Loesch, for Station WZBO-FM, Edenton, North Carolina, IS MODIFIED to specify operation on Channel 273C2, in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of WYAL Radio, Inc., for Station WWRT, Scotland Neck, North Carolina, IS MODIFIED to specify operation on Channel 238A in lieu of Channel 274A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WWRT's construction permit, BPH-870331MP, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-870331MP, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows: Station WWRT, WYAL Radio, Inc., P.O. Box 425, Scotland Neck, North Carolina 27874.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 273C2 at Edenton are North Latitude 35-55-52 and West Longitude 76-31-34. The coordinates for Channel 238A at Scotland Neck are 36-08-09 and 77-26-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-448

In the Matter of

Amendment of Section 73.202(b), RM-7427
Table of Allotments,
FM Broadcast Stations.
(Nome, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 5997 (1990), issued in response to a petition filed on behalf of the Catholic Bishop of Northern Alaska ("petitioner") proposing the allotment of Channel 241A to Nome, Alaska, as that community's second local FM broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 241A to Nome since it could provide an additional local FM broadcast service to the community. Channel 241A can be allotted to Nome consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Nome, Alaska	241A, 262A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 241A at Nome, Alaska, will open on **March 12, 1991,** and close on **April 11, 1991.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 241A at Nome are 64-30-00 and 165-25-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-600

In re Applications of

MOODY BIBLE INSTITUTE (hereafter "Moody")	File No. BPED-880818ML
MICHAEL DAVID MAHAFFEY (hereafter "Mahaffey")	File No. BPH-880824MC
CYNTHIA W. WARE (hereafter "Ware")	File No. BPH-880824ML
HENRY KENNEY, JR. (hereafter "Kenney")	File No. BPH-880824MN
SPANS LIMITED PARTNERSHIP (hereafter "SPANS")	File No. BPH-880825MG
David Earl Hoxeng d/b/a ADX COMMUNICATIONS OF LEXINGTON (hereafter "ADX")	File No. BPH-880825MH
John Barrett Townsend II and Frances Pride Townsend d/b/a BETHANY-BARRETT BROADCASTING (hereafter "Bethany-Barrett")	File No. BPH-880825MK
21ST CENTURY COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "21st")	File No. BPH-880825MR
STANLEY/ LEXINGTON, LTD. (hereafter "Stanley/Lexington")	File No. BPH-880825MX
SST, INC. (hereafter "SST")	File No. BPH-880825MY
LEXINGTON URBAN COMMUNICATIONS, LIMITED PARTNERSHIP (hereafter "Lexington")	File No. BPH-880825NB
SANTEE BROADCASTING, INC. (hereafter "Santee")	File No. BPH-880825NE
Helen V. Millar and Nancy S. Millar d/b/a MILLAR BROADCASTING COMPANY (hereafter "Millar")	File No. BPH-880825NI
SUZANNE E. VILLENEUVE (hereafter "Villeneuve")	File No. BPH-880825NN
SOJOURNER COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Sojourner")	File No. BPH-880825NT
OCEAN WAVES BROADCASTING (hereafter "OWB")	File No. BPH-880825OB
SUSAN L. CALLER (hereafter "Caller")	File No. BPH-880825OD
Robert A. Manning and Gary L. Cox, A Partnership d/b/a ATLANTIC RADIO PARTNERS (hereafter "Atlantic")	File No. BPH-880825OH
PATRICK D. MCCONNELL (hereafter "McConnell")	File No. BPH-880825OJ
NIK-O-LIN, INC. (hereafter "NIK-O-LIN")	File No. BPH-880825OL
JACK L. GIVENS (hereafter "Givens")	File No. BPH-880825OQ
DJC, LTD. (hereafter "DJC")	File No. BPH-880825PA
PAMELA R. JONES (hereafter "Jones")	File No. BPH-880811MG (DISMISSED HEREIN)
PRESS BROADCASTING CO. (hereafter "Press")	File No. BPH-880825MC (DISMISSED HEREIN)

URBAN KENTUCKY BROADCASTERS, INC.
(hereafter "UKBI")

File No. BPH-880825ME
(DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 283C2 (104.5 MHz)
in Lexington-Fayette, Kentucky

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 23, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters*. An engineering study of the applications filed by Jones and UKBI reveals a discrepancy between the locations of the proposed sites as plotted and the coordinates listed in their applications at Section V-B, Item 4 and Section V-G, Item 1. Specifically, Jones' application indicates that the site is located at 38^0 10' 49" NL and 84^0 16' *46"* WL but she plots the site at 38^0 10' 49" NL and 84^0 16' *55* " WL. UKBI's application states that its site is at 38^0 07' *13* " NL and 84^0 18' 17" WL but it plots its site at 38^0 07' *16*" NL and 84^0 18' 17" WL. Therefore, it is impossible to determine from the face of the applications whether the proposals are in compliance with the Commission's Rules.

3. In the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) ("Report and Order"), the Commission adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially complete." This approach benefits the public interest by reducing frivolous and speculative applications and streamlining our processing procedures to make more efficient use of our staff and other resources. *See, e.g. Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986).

4. Further, in Appendix D to the *Report and Order, supra*, we stated that the absence of the geographic coordinates, to the nearest second, would prevent a determination of acceptability and thus would render the application not substantially complete. Thus, in the present case, these inconsistent coordinates make it impossible to determine the veracity of the site availability certifications, the environmental impact statements, or the information supplied for FAA approval. In other cases, absence of these data makes it impossible to determine the distance from the proposed site to the other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*see* 47 C.F.R. § 73.315), and is fundamental to analysis of a proposal's environmental and electromagnetic effects on other nearby communications facilities. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989). Accordingly, Jones' and UKBI 's application will be returned as inadvertently accepted for filing.

5. Press' application fails to include the 7.5 minute series U.S. Geological survey topographic quadrangle map as required by FCC Form 301, Section V-B, Item 15 (1986). The applicant indicates that the map was included in its Engineering Exhibit EE-1 as Figure 2. However, Figure 2 was missing.

6. By means of the *Report and Order, supra*, the Commission established a prerequisite of tenderability or substantial completeness that commercial FM broadcast applications include transmitter site maps in accordance with our *Public Notice*, Mimeo 3693, released April 5, 1985, and called for by FCC Form 301, Section V-B, Item 15 (1986). *See* paragraph 23 and Appendix D to the *Report and Order*. Specifically, Appendix D lists the critical elements that are essential for staff processing in order to determine that an application is substantially complete. If any one of the elements described there is missing from an application following the close of the applicable window, that application must be returned as not sufficient for tender. Accordingly, because of the absence of a transmitter site map, Press's application will be returned as inadvertently accepted for tender.

7. *NIK-O-LIN*. On January 13, 1989, Mr. Dan L. Thompson filed an informal objection against NIK-O-LIN's application. NIK-O-LIN had proposed to locate its transmitter site in Bourbon County, Kentucky where Mr. Thompson is a resident and property owner. Mr. Thompson objected to the proposed location of NIK-O-LIN's tower primarily because the site is in close proximity to his property, which contains his private airport. As a consequence, Mr. Thompson argues that the tower would constitute an air hazard to all aircraft that land at the airport.

8. On December 29, 1988, NIK-O-LIN amended its application to specify a new transmitter site. Subsequently, by letter dated February 15, 1989 and received by the Commission on February 23, 1989, Mr. Thompson informed the Commission that NIK-O-LIN was "successful in securing another suitable location that will not interfer with my operation." Based on the foregoing, the informal objection will be dismissed as moot.

9. *SPANS, Lexington, Atlantic*. Section II, Item 4 of FCC Form 301 (1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. SPANS, Lexington and Atlantic have not completed Item 4 correctly. SPANS does not give street addresses for the applicant and the principals of the partnership. Lexington does not give a street address for the applicant. Atlantic lists a post office box number as the residence address for the applicant. Accordingly, SPANS, Lexington and Atlantic must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *SPANS*. Section II, Item 9(a), form 301 (1986) asks whether or not the applicant is in violation of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments. SPANS answered in the affirmative. Accordingly, an appropriate issue will be specified.

11. SPANS' application, as originally filed, contained a certification that it had sufficient net liquid assets on hand, or that sufficient funds were available from committed sources, to construct and operate the requested facilities for three months without revenue. However, on October 5, 1990, SPANS amended its application to report that the letter of reasonable assurance obtained from the National Bank of Washington (NBW) probably will not be honored. SPANS states that recently the NBW was placed in receivership by federal authorities. Subsequently, the NBW was acquired by the Riggs National Bank, which most likely will not honor the NBW letter. In view of the foregoing, there is a question of whether or not SPANS' financial certification is still valid. Accordingly, a financial qualifications issue will be specified below.

12. *OWB and Atlantic*. Section III of FCC Form 301 (1986) requires that applicants certify that they have sufficient net liquid assets on hand, or that sufficient funds are available from committed sources to operate the requested facility for three months without revenue. OWB and Atlantic certified that they were not financially qualified. Accordingly, an appropriate issue will be specified below.

13. On March 2, 1990 NIK-O-LIN filed petitions to dismiss or deny the applications of OWB and Atlantic. NIK-O-LIN argues that because OWB and Atlantic have failed to certify they are financially qualified to construct and operate their proposed facilities, their applications should not have been accepted for filing and must now be dismissed. However, because of the action taken in paragraph 12 of this Order, NIK-O-LIN's petitions will be granted to the extent indicated herein and denied in all other respects. *See Northhampton Media Associates*, 4 FCC Rcd 5517 (1989).

14. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. OWB proposes to employ five or more full time employees; however, it did not include the required statement. Additionally, although the following applicants have filed such statements, they are deficient. Accordingly, each applicant listed below will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order or an appropriate issue will be specified by the Judge.

APPLICANTS	DEFICIENCIES
Lexington	Failed to identify the school(s) or other beneficiaries, as well as the proposed form of assistance the applicant will provide in its proposed training program for minorities and women interested in entering the broadcast ield.
Villeneuve	Failed to identify specific sources of recruitment specializing in women and minority candidates; Failed to identify publications she will utilize in attracting women and minority candidates.
Atlantic	Failed to identify specific sources of recruitment specializing in women and minority candidates.
DJC	Failed to identify specific sources of recruitment specializing in women candidates; Failed to identify the proposed form of assistance the applicant will provide in its proposed training program for minorities and women interested in entering the broadcast field.

15. The engineering data submitted by Mahaffey, Ware, Kenney, Bethany-Barrett, 21st, Stanley/Lexington, SST, Lexington, Millar, OWB, Caller, NIK-O-LIN, Givens and DJC does not clearly demonstrate that they provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that the aforementioned applicants' 3.16 mV/m contours are in substantial compliance with this requirement. Their contours would cover over 80% of the community of license. Accordingly, since no waiver is required, the requests for waiver filed by the aforementioned applicants will be dismissed as moot.

16. *Ware*. Ware is general sales manager at WHRS-AM and WLFX-FM [formerly WFMI-FM], Winchester, Kentucky, thus triggering a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). Ware has indicated that, in the event a construction permit is issued to her in this proceeding, she will resign her position at these stations. Accordingly, an appropriate condition will be specified below.

17. *Caller*. Caller indicates that her husband, Steven Caller, is currently the treasurer, a director and holds a 6.375% interest in F.B.C., Incorporated, licensee of WLKT-TV, Lexington, Kentucky. Since the instant proposal and WLKT-TV would essentially serve the same community, Mr. Caller's involvement with WLKT-TV would violate the Commission's one-to-a-market rule.[2] Caller has indicated that her husband intends to terminate his interest and sever all connections with WLKT-TV in the event of grant of the referenced application. Accordingly, in the event of grant of Caller's application, Steven Caller will be required to sever all connections with WLKT-TV prior to the commencement of program test authority.

18. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S)FILED
Mahaffey	January 6, 1989, August 29, 1989, November 16, 1989
SPANS	Janauary 31, 1989, April 11, 1989, August 25, 1989, November 6, 1989, April 16, 1990, October 5, 1990
21st	March 7, 1990
Stanley/Lexington	May 15, 1989
SST	June 21, 1990
Santee	June 8, 1989, October 11, 1989, June 1, 1990
Millar	March 16, 1989, January 16, 1990, September 28, 1990
NIK-O-LIN	June 12, 1989, April 9, 1990, May 15, 1990, June 21, 1990, August 3, 1990, August 24, 1990

19. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

20. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether SPANS is owned or controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.

2. To determine with respect to SPANS, OWB and Atlantic, whether the applicants are financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That the applications of Jones and UBKI ARE RETURNED as inadvertently accepted for filing and the application of Press IS RETURNED as inadvertently accepted for tender.

23. IT IS FURTHER ORDERED, That the informal objection filed on January 13, 1989 by Mr. Dan L. Thompson against the application of NIK-O-LIN IS DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED, That SPANS, Lexington and Atlantic shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That the petitions to dismiss or deny filed on March 2, 1990 by NIK-O-LIN against the applications of OWB and Atlantic ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

26. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Lexington, Villeneuve, OWB, Atlantic and DJC shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

27. IT IS FURTHER ORDERED, That the requests for waiver of § 73.315(a) filed by Mahaffey, Ware, Kenney, Bethany-Barrett, 21st, Stanley/Lexington, SST, Lexington, Millar, OWB, Caller, NIK-O-LIN, Givens and DJC ARE DISMISSED AS MOOT.

28. IT IS FURTHER ORDERED, That in the event of a grant of Ware's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization permittee shall certify to the Commission that Cynthia Ware has resigned her position as general sales manager at WHRS-AM and WLFX-FM, Winchester, Kentucky.

29. IT IS FURTHER ORDERED, That in the event of a grant of Caller's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that her husband, Steven Caller, has divested his interest and severed all connections with F.B.C., Incorporated, licensee of Station WLKT-TV.

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Mahaffey, SPANS, 21st, Stanley/Lexington, SST, Santee, Millar and NIK-O-LIN ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Com-

munications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] D.V.D. Broadcasting Limited Partnership (BPH-880825NK) and Perfect Pitch, Inc. (BPH-880825NW) requested dismissal of their applications. The requests were voluntary and in accordance with our requirements governing such matters. Accordingly, the applications were dismissed by Commission letter dated July 12, 1990.

[2] Commission policy states that a common interest can reasonably be presumed to exist between husband and wife, and that the broadcast interests of one can be attributed to the other. *Alexander S. Klein*, 86 FCC 2d 423, 425-27 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
RADIO MABLETON LIMITED	File No. BPH-870710MT
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New
FM Station on Channel 273A
(102.5 MHZ), Mableton, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1991; Released: Janaury 23, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. Subsequent to the release of our *Memorandum Opinion and Order*, 5 FCC Rcd 6314 (Rev. Bd. 1990), remanding the above-captioned proceeding for supplemental evidentiary hearings before the ALJ, the Board received: (1) a "Petition For Declaratory Ruling," filed November 26, 1990 by Mableton Broadcasting Co., Inc. ("MBC"); and (2) an "Appeal of Ruling Refusing to Disqualify," filed December 14, 1990 by QRW Partners, Limited Partnership ("QRW"), seeking removal of the presiding ALJ for bias.[1] No responsive pleadings appear to have been filed to either. We will dismiss the former and deny the latter.

MBC PETITION

2. Citing Section 1.2 of the Commission's rules, 47 CFR § 1.2, MBC seeks a declaration from the Board that certain rulings of the ALJ, generally relating to prehearing procedures, are either *ultra vires* or unduly burdensome.[2] Initially, however, Section 1.2 of the rules gives only the full Commission authority to issue declaratory rulings,[3] an authority not expressly delegated to this Board. *See* 47 CFR § 0.361 *et seq.* (delegations of authority to Review Board).

3. But, second, even if we ignored MBC's petition styling and regarded its pleading as an appeal under Section 1.301 of the rules, 47 CFR § 1.301, dismissal would be required. Under subsection (b) of the aforecited rule, appeals of interlocutory ALJ rulings are not accepted unless permission for appeal to the Board is first secured from the ALJ; if the ALJ denies permission, the grievance ordinarily may be raised only upon exception after release of the initial decision.[4] *See, e.g., Georgia Public Telecommunications Comm'n*, 5 FCC Rcd 3714 (Rev. Bd. 1990). Here, MBC did not first seek permission from the ALJ to appeal, and we will not speculate on the ALJ's (hypothetical) reaction to any such permission request, in clear disharmony with the explicit and implied logic of Section 1.301.[5]

QRW APPEAL

4. By motion of November 13, 1990, QRW sought from the ALJ a ruling disqualifying himself. The ALJ denied that motion, saying he had "looked into his own mind" and found he had acted on the merits, not out of prejudice. FCC 90M-3951, *supra* note 1.[6] In that now-denied motion, QRW had asserted a bias against it, in the main, because at the initial hearing the ALJ asked numerous and repeated questions about the media interests and employment positions of QRW principal William Dilday, past and present. *See* Appeal at 7-16 (and transcript excerpts therein).[7] More specifically, QRW here asserts that (*id.*, at 17):

> the transcript of this proceeding demonstrates that Judge Miller had a definite bias and prejudice against William Dilday. Apparently the source of this bias and prejudice was Mr. Dilday's status as a principal in an applicant in the RKO Boston proceeding -- a proceeding over which Judge Miller presided. Regardless of the source of the prejudice and bias, Judge Miller was prejudiced and biased to the point where he had a preconceived notion that QRW was the alter ego of William Dilday. The Presiding Judge in his Denial Order made no attempt to explain away his action in the hearing, other than to make the unresponsive general de-

fense that "it was an effort on the Trial Judge's part to develop a full and complete record on the standard comparative issue."

5. In considering appeals under Section 1.245, the Board shall be guided by the standards developed by the Commission to resolve claims of bias, most recently reflected in cases such as *WWOR-TV, Inc.*, 5 FCC RCD 2845 (1990). There the Commission stated:

> In order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *See WWOR -TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989), citing *Berger v. United States*, 255 U.S. 22, 23, 33-35 (1921) ("[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgement"). To be disqualifying the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some bias other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

6. Here, however, and unlike most cases which seek disqualification based upon adverse interlocutory rulings made by an ALJ during the course of a hearing, *see, e.g., WWOR-TV, Inc.*; *Tri-State Community Development*, 5 FCC Rcd 942 (1990), QRW bases its instant request for disqualification on transcript quotations made in the prior, *initial* hearing. So far as the Board is aware, QRW did not seek ALJ disqualification during that initial hearing, based upon the ALJ's questions there regarding Dilday. Since that initial hearing, much water has flowed over the dam: (1) the ALJ released his *Initial Decision*, 5 FCC Rcd 2774 (1990); and (2) this Board reviewed all of the exceptions to that initial decision, heard oral argument, issued its remand order correcting primary errors, and mandated a supplemental hearing necessary for the Board to decide the case fairly to all parties. In fact, our previous *Memorandum Opinion and Order* remanding the case vacated the adverse ALJ conclusions against QRW, and it required new findings and conclusions to be set down by the ALJ "without the coloration of matter not within the customary and reasonable purview of the standard comparative issue," *see* 5 FCC Rcd at 6223, findings and conclusions the Board (the full Commission, and the court, if necessary) may review upon any exceptions by QRW to the ALJ's supplemental decision.

7. But even putting aside the delayed timing of QRW's disqualification request, and assuming that QRW's perception of ALJ bias at the initial hearing has lately led it to seek a different ALJ for the supplemental hearing, we find in its appeal an insufficient basis to find bias on the grounds asserted by QRW. As noted above, QRW's complaint is based almost entirely upon the ALJ's questioning of, and about, William Dilday.[5] It is true that the ALJ's *Initial Decision* did find QRW overall to be a sham applicant, in that it regarded QRW's general partner (only 10% QRW equity) to be a "front" for limited partner William Dilday (30% QRW equity). *see id.*, 5 FCC Rcd at 2486-88, 2494; but the transcript quotations proferred here by QRW, though reflecting skepticism that a man like Dilday (with a long history of, and numerous interests in, broadcasting) would remain absolutely passive in the affairs of this Mableton station, do not on their face bespeak of animus or a "bent of mind" eminating from extrajudicial sources. *WWOR-TV, supra* (quoting *Berger v. U.S.*, 225 U.S. 22, 33-35 (1921)).

8. Moreover, and without indicating in the slightest any likely outcome, we remind that we have already reviewed QRW's extensive exceptions to the ALJ's *Initial Decision*, vacated entirely the adverse findings and conclusions, and required of the ALJ a fresh report on QRW to be grounded solely upon facts properly on the record. Should QRW be dissatisfied with the ALJ's supplemental decision, it may again register its exceptions with the Board, which will be no less receptive to claims of mistreatment than it was in addressing the grievances of QRW (and several other applicants) in the Board's prior review of the *Initial Decision*. For the nonce, QRW would appear to need no further, extraordinary assurance of fair treatment on its application.[9]

9. ACCORDINGLY IT IS ORDERED, That the "Petition for Declaratory Ruling" filed November 26, 1990 by Mableton Broadcasting Company, Inc. IS DISMISSED; and the "Appeal of Ruling Refusing to Dsiqualify" filed December 14, 1990 by QRW Partners Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] By *Memorandum Opinion and Order*, FCC 90M-3951, released December 13, 1990, and pursuant to 47 CFR § 1.245, the ALJ denied QRW's motion to disqualify himself. By companion *Memorandum Opinion and Order*, FCC 90M-3997, released December 18, 1990, and pursuant to subsection (b)(4) of the aforecited rule, the ALJ suspended the remanded proceeding, thus depriving the earlier-filed MBC petition of any apparent urgency.

[2] More specifically, MBC contests the authority of the ALJ:

> (a) to order a party to file a supplemental appearance;
>
> (b) to order a party to appear at the offices of competing party's counsel for purposes of settlement discussions; and
>
> (c) to order a party to participate at hearing sessions, when that party has no burden of proceeding or proof on the issues to be heard.

[3] 47 CFR § 1.2 reads as follows:

> The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty. (5 U.S.C. 554).

[4] *But see* 47 CFR § 1.301(a), allowing the interlocutory appeals as a matter of right where a party's right to participate in a hearing is terminated, where a claim of privilege is denied, or where counsel is removed by an ALJ.

[5] Because we dismiss the MBC petition on procedural grounds, we do not reach the merits of its claims as to the ALJ's rulings or decide whether the rulings reflect a flagrant abuse of discretion. *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971).

[6] The Commission recently delegated to the Review Board jurisdiction to rule on appeals of ALJ disqualification rulings. *Review of Motions to Disqualify Presiding Officer*, 5 FCC Rcd 5366 (1990). An applicant adversely affected may later, of course, seek full Commission review of the Board's disposition of such an appeal. *See id.*; *see generally* 47 U.S.C. § 155(a)(4) (action taken by delegated authority subject to review by Commission *en banc*).

[7] QRW, as further evidence of bias, adverts to language in the ALJ's *First Remanded Hearing Order* FCC 90M-3657, released November 19, 1990. In that order, issued in response to the Board's *Memorandum Opinion and Order* remanding this case for further hearing, the ALJ declared:

> Based on the evidence of record the Trial Judge has made it clear that there is no way he could recommend any of the following six applicants for a grant: (1) MBC; (2) Gonzales; (3) Voth; (4) Loreno Jelks; (5) MMC; and (6) QRW.

FCC 90M-3657 at n.23. This footnote (and other language, *passim*, of the ALJ's November 19 *Prehearing Order)* is most certainly injudicious, but appears to be directed largely to the Board's remand order and not to the applicants themselves. The specific footnote language invoked here by QRW, unfortunate as it appears, is facially ambiguous, since it refers to "the evidence of record" *prior to* the supplemental hearing and revised decision now ordered by the Board, and need not necessarily be construed as a critical predisposition toward all *six* of the applicants denominated in the subject footnote. In that regard, it is observed that none of the other five applicants highlighted therein have charged bias or sought the ALJ's disqualification. Nevertheless, particularly in light of the injudicious language of the footnote (as well as many other intemperate passages in the ALJ's November *Prehearing Order)*, the Board will conduct a *de novo* review of the supplemental record developed by the ALJ. And, just as it did in its remand order, it will correct any and all perceived errors made by the ALJ.

[8] While QRW's instant Appeal quotes extensively from the transcript of the initial hearing, the following excerpts illustrate the nature and tone of the ALJ's interest in William Dilday:

> JUDGE MILLER: We now move to [QRW counsel] Mr. Winston.
>
> Mr. Winston, let me tell you something that I'm going to bring up with me so that you will have a chance to think about this.
>
> Have you given the diversification holdings of your limited partnership?
>
> MR. WINSTON: We did not, your honor.
>
> JUDGE MILLER: And I'm particularly interested in, you know who I'm interested in, don't you?
>
> MR. WINSTON: Yes, Mr. Dilday.
>
> JUDGE MILLER: Mr. Dilday, that's right, because I had him in -- in RKO Boston. Well, I -- proceed. One of the Dildays. I had two Dildays in RKO Boston. (Tr. 269)

Later in the same admissions session, Judge Miller stated to Mr. Hart, counsel for another applicant:

> I -- I'm always interested when Mr. Dilday's in an application, don't you see.
>
> I have no idea whether Mr. -- Mr. Dilday happens to be black, but Mr. Dilday has his finger in a lot of pots, and I know that, see, and if you can show that that's [QRW's application] a sham, be my guest. (Tr. 274).

Still later in the admission's session, the Presiding Judge again spontaneously raised the question of Mr. Dilday:

> JUDGE MILLER: That Jackson, Mississippi, makes me, makes me even more interested in seeing Mr. Dilday's holdings.
>
> MR HART: Right. That was the part I was focusing on, your honor. I do have an objection to --
>
> JUDGE MILLER: I don't know if that's the same Dilday that used to run the Jackson, Mississippi, television?
>
> MR. WINSTON: Yes, that is the same Dilday, sir.
>
> JUDGE MILLER: Go ahead Mr. Hart.
>
> MR. HART: Paragraph 6 of that exhibit the sentence, "I relocated, hired and trained staff members." I don't think that that is necessary to be included in the exhibit. The broadcast experience is the date and the position held. I think a little surplus, so I would move to strike that sentence.
>
> JUDGE MILLER: That's overruled, and I may be doing you a favor.
>
> MR. HART: All right, I have --
>
> JUDGE MILLER: Because -- because Mr. Hart, if I remember, this -- this has been a while, Mr. Dilday travels throughout the South trying his very best to bail out stations in financial trouble. That's one of his activities. Isn't that correct, Mr. Winston?
>
> MR. WINSTON: I'm not aware of that, your honor. I don't -- I don't think that's true characterize -- characterization.
>
> JUDGE MILLER: Well, maybe I'm wrong. It may be a while. I'll go back and take a look, but it may be a remote possibility that she's working for Dilday.

Appeal at 7-8.

[9] *See* , however, *supra* note 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION, INC.,
Complainant,

v. File No. E-89-385

WISCONSIN BELL, INC.,
Defendant.

ORDER

Adopted: January 14, 1991; Released: January 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1989 the Competitive Telecommunications Association, Inc. (hereinafter "CompTel") filed on behalf of a number of its member companies, including Schneider Communications, Inc., (hereinafter "Schneider Communications")[1] the above-captioned formal complaint against Wisconsin Bell Telephone Company (hereinafter the "Defendant"). The complaint seeks damages for Defendant's alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986.

2. The parties to the complaint have conducted discussions aimed at settling matters in controversy. On December 21, 1990, CompTel and Wisconsin Bell filed a joint motion seeking dismissal of the complaint with prejudice as it relates to Schneider Communications. The parties state that a mutually agreeable settlement of all pending controversies between Schneider Communications and the Defendant has been reached.

3. We are satisfied that dismissal of the complaint insofar as it relates to Schneider Communications will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE to the extent that it relates to the claims of Schneider Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] The remaining member companies represented by the complainant include: American Sharecom, Inc., ITT Communications Services, Inc., Litel Telecommunications Corp., Telecommunications Services Corp., Telephone Associates Long Distance Services, Telus Communications, Inc. and Wisconsin American Sharecom, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE
OF WASHINGTON, INC.,
Complainant,
v. File No. E-90-302

CONTEL OF VIRGINIA, INC.,
Defendant.

ORDER

Adopted: January 14, 1991; Released: January 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Long Distance Service of Washington, Inc. (hereinafter "LDS") filed with the Commission the above-captioned formal complaint against Contel of Virginia, Inc. (hereinafter "Contel") seeking recovery of damages for Contel's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Contel filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies has been reached. On January 11, 1991, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CAGAL CELLULAR COMMUNICATIONS CORPORATION — File No. 02883-CL-TC-1-89

For consent to the transfer of control of the authorization of Station KNKA697 operating in the Domestic Public Cellular Radio Telecommunications Service from Paul Rosenthal to McCaw Communications of Santa Rosa, Inc. in the Santa Rosa-Petaluma Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1991; Released: January 23, 1991

By the Chief, Mobile Services Division:

1. On March 22, 1989, Paul Rosenthal (Rosenthal) filed an application for the consent to the transfer of control of Cagal Cellular Communications Corporation, Station KNKA697, to McCaw Communications of Santa Rosa, Inc. (McCaw).[1] Grant Singleton (Singleton) has filed Comments on the captioned application. Cagal filed a reply to Singleton's Comments.[2]

2. Singleton was ranked second behind Cagal in the Commission's lottery for the Santa Rosa-Petaluma, California Metropolitan Statistical Area. He states that while he interposes no objection to the proposed transfer of control, he does request that any grant be conditioned on the Commission's decision on Singleton's Application for Review that he filed August 17, 1987, which seeks reversal of the initial grant of Cagal's cellular construction permit.

3. Based on the Commission's denial of Singleton's Application for Review (*see Cagal Cellular Communications Corporation*, FCC 90-421 [adopted Dec. 19, 1990; released Jan. 16, 1991]), we find that Singleton's Comments are moot. We also find that the captioned application for the transfer of control from Rosenthal to McCaw will serve the public interest, convenience, and necessity. Therefore, the captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] This application was listed on *Public Notice*, Report No. CL-89-128 (released April 13, 1989).

[2] The Cellular Corporation had filed a Petition to Dismiss or Deny the captioned application but subsequently withdrew it pursuant to a settlement agreement with Cagal and McCaw.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

INTERSTATE CELLULAR, INC. File No. 07510-CL-L-91

For a license to partially cover construction permit for a Cellular Mobile Telephone System to Operate on Frequency Block B in the Alabama 8-Lee (B 2) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 23, 1991

By the Chief, Mobile Services Division:

1. Interstate Cellular, Inc., a cellular mobile telephone system, (Interstate) has filed an application to partially cover its construction permit to operate on Frequency Block B (wireline) to serve the Alabama 8-Lee Rural Service Area (RSA). Dana Communications, Ltd. (Dana) has filed a petition to defer the issuance of the covering license. Interstate has filed an opposition to the petition. For the reasons set forth below, we deny the petition and grant the application.

I. BACKGROUND AND CONTENTIONS

2. Dana requests that the Commission delay granting operating authority to Interstate until Dana, the nonwireline tentative selectee in this market, is granted its construction permit. Dana maintains that unless the Commission defers Interstate's operating authority the benefits of competition are likely to be denied to consumers in the Lee RSA and monopoly pricing will occur. Dana explains that while its market research reveals there is demand for cellular service, it is unlikely that a nonwireline system will survive if the wireline is allowed such a substantial head start.

3. On May 18, 1990, the Mobile Services Division (MSD) dismissed Dana's application finding that it failed to contain the financial showing required by Section 22.917(c) of the rules.[1] Subsequently, Dana submitted an amendment to its application and a petition for reconsideration. Dana avers that grant of its application has been delayed by MSD's failure to act on its request for reinstatement of its permit to construct. Dana concludes that denying deferral of Interstate's operating authority would be contrary to the Commission's goal of establishing competitive cellular service.

II. DISCUSSION

4. The Commission has stated repeatedly that a party requesting deferral of wireline operating authority "[b]ears a heavy burden of demonstrating that such action would be in the public interest."[2] *Cellular Report and Order*; *see also*, *Eau Claire Cellular Telephone Company*, 3 FCC Rcd 3081 (Com. Car. Bur., 1988); *Illinois SMSA Limited Partnership*, 3 FCC Rcd 6144 (Com. Car. Bur., 1988). The Commission has stated that it would defer action on a wireline application only "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Cellular Report and Order, on reconsideration*, 89 FCC 2d 75 at n.32. In this case, the public interest will be served by expeditious provision of cellular service to the public. The Commission does not guarantee the economic well-being of any applicant or licensee, but rather desires to further the public interest by promoting the provision of reliable, economic service as soon as possible. *Cellular Report and Order*, 86 FCC 2d at 491, and *on reconsideration*, 89 FCC 2d at 74-75.

5. Dana has failed to show that the public interest would not be served by Interstate's early entry. Nor are we persuaded by Dana's unsupported assertion that nonwireline competition would be virtually precluded by permitting Interstate to have a head start, or that such a head start would subject the area to monopoly pricing. Early entry by wireline carriers in other markets has not prevented nonwireline permitees from successfully constructing and operating cellular systems in those markets. Dana has not provided evidence that customers choosing to receive service from Interstate will continue to subscribe to that carrier after entry of a second carrier. *See, e.g., Miami CGSA, Inc.*, Mimeo No. 4507 at n.25 (Com. Car. Bur. May 31, 1984). *See also Century Cellunet of Jackson MSA Limited Partnership*, 4 FCC Rcd 3414 (Mob. Ser. Div. 1988).

6. Based on a review of its petition to defer, we find that Dana has failed to satisfy the heavy burden of demonstrating that early entry by Interstate will jeopardize the development of a competitive market in the Lee RSA and disserve the public interest.

7. Accordingly, IT IS ORDERED, that the application of Interstate Cellular, Inc. for a partial covering license, File No. 07510-CL-L-91, IS GRANTED.

8. IT IS FURTHER ORDERED, that the Petition for Deferral of Operating Authority filed by Dana Communications, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.917 (c) (5) of the rules provides in pertinent part that a non-wireline RSA applicant shall demonstrate at the time of filing that its application has either a firm financial commitment or the available financial resources necessary to construct and operate the proposed cellular system for one year.

[2] *Cellular Communications Systems*, 86 FCC 2d 469, 490 (1981) (*Cellular Report and Order*), *on reconsideration*, 89 FCC 2d 58 (1982), *on further reconsideration*, 90 FCC 2d 571 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GARY W. SHORT FOIA Control No. 90-122

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1991; Released: January 23, 1991

By the Commission:

1. The Commission has before it an Application for Review filed by SDC Corporation (SDC) seeking review of an initial ruling by the Common Carrier Bureau (Bureau), which granted a request for records by Gary W. Short (Short) under the Freedom of Information Act (FOIA). 5 U.S.C. §552. Short was granted access to a list of companies and their assigned five-digit (10XXX) Carrier Identification Code (CIC). *See* Letter to Gary W. Short from Richard M. Firestone, Chief, Common Carrier Bureau, dated July 30, 1990. On appeal, SDC again requests confidentiality for its CIC.[1]

2. As noted in the Bureau decision, Bell Communications Research (Bellcore), the entity that administers the North American Numbering Plan (NANP), assigns CICs to interexchange carriers and other companies requesting codes. Bellcore has provided lists of assigned CICs to the Bureau since the mid-1980s. In response to Short's request, the Bureau sent a letter to all companies with CICs, informing them that a FOIA request had been filed, and requesting companies interested in confidential status for their CICs to file a request for confidentiality with the Bureau. The letter stated that companies were required to identify the specific FOIA provision under which they were claiming a right to confidentiality.

3. Fourteen of the nearly seven hundred companies with CICs filed confidentiality requests, contending that their CICs were protected from disclosure under Exemption 4 of the FOIA, which protects "trade secrets" and confidential "commercial or financial information."[2] After reviewing these requests, the Bureau concluded that they failed to substantiate their contentions that CICs were protected under FOIA.

4. SDC now restates in its Application for Review its claim that its CIC is a trade secret under Exemption 4 to the FOIA. SDC asserts that when a CIC was issued to a previous subsidiary to its parent company, the subsidiary "received many disruptive telephone calls desiring or inquiring about using [the subsidiary] as their choice as a common carrier." It states that confidentiality for its CIC is required to prevent similar "nuisance" calls.

5. We find that SDC has failed to demonstrate that its CIC is protected from disclosure as a trade secret. The definition of a trade secret under FOIA Exemption 4 requires that the information be the "end product of either innovation or substantial effort" by SDC. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). SDC's CIC code is not the result of any innovation or effort on its part, as SDC merely applied for a CIC code from Bellcore along with several hundred other applicants. SDC's only claim is that release of its CIC will result in nuisance calls requesting that it provide service as a common carrier. It appears unlikely, however, that public access to a list of 700 CICs will result in telephone requests to SDC for long-distance service, especially given that the CIC list incorporates the names of many corporations that clearly are not common carriers and does not include information regarding the type of services that SDC provides. Even assuming that SDC receives a few calls, its CIC is not within the trade secret exemption and, hence, is subject to the disclosure mandate of FOIA.

6. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Application for Review filed by SDC IS DENIED. SDC will be accorded 10 working days from the release date of this Order in which to seek a judicial stay. *See* 47 C.F.R. § 0.461(h)(4).

7. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Another party also filed an Application for Review requesting confidentiality for its CIC. However, on October 22, 1990 the party wrote a letter stating that its need for confidentiality would expire on December 15, 1990. Accordingly, the party's Application for Review is now moot.

[2] 5 U.S.C. § 552(b)(4).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Virginia RSA 6 Cellular Limited Partnership — File Nos. 10880-CL-P-686-B1-89; 163500-91-17-JFW

For a facility in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 686, Virginia 6 (Highland)

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: January 7, 1991; Released: January 8, 1991

By the Commission:

I. BACKGROUND

1. On November 24, 1989, the Commission announced that a full market settlement had been reached by the wireline cellular applicants in the Highland, Virginia market (RSA 686: Virginia 6).[1] On March 21, 1990, Virginia RSA 6 Cellular Limited Partnership (Partnership)[2] was designated as the surviving applicant for the wireline system in that segment of the market.[3] On April 30, 1990, Partnership was named as the tentative selectee.[4]

2. On June 18, 1990, Charles Rease Braley, III (Braley), the nonwireline cellular tentative selectee for the Highland, Virginia market, filed a timely petition to dismiss or deny Partnership's application. On June 26, 1990, Partnership filed an opposition to the petition to deny.

II. PREMATURE CONSTRUCTION

3. *Contentions.* Braley contends that Partnership unlawfully constructed the proposed communications tower sites at Kiser Hill (near Waynesboro, Virginia), College Park Hill (in Staunton, Virginia), and Massanutten Peak (near Harrisonburg, Virginia), in violation of Sections 301 and 319 of the Communications Act of 1934, as amended, (the Act).[5] In support thereof, Braley submitted sworn affidavits, photographs and sketches showing that communications towers, newly mounted cellular antennas and new transmission lines routed from these antennas to apparently new equipment shelters were observed on May 21, 1990 and May 31, 1990 at both the Kiser Hill and College Park Hill sites, and on May 31, 1990 at the Massanutten Peak site. Braley's supporting materials also document that a new side-mounted microwave antenna was observed at both the College Park Hill and Massanutten Peak sites on May 21, 1990 and May 31, 1990, respectively, and that an air conditioning unit was overheard in the equipment shelter at College Park Hill on May 31, 1990. The supporting materials further document that an equipment shelter at Massanutten Peak was posted with a sign warning that the intrusion, fire and temperature alarms were active in the building. Braley also submits an experienced cellular engineer's sworn statement that on May 31, 1990, "the electric power meters next to the three cellular equipment shelters indicated that power was being drawn by all of [the] facilities," and that "the cellular equipment at each of the sites was fully constructed, tested, tweaked and awaiting activation." Petition, Attachment B, at 7-8.

4. Braley further contends that Partnership's construction activities are not authorized by the exception set forth in Section 22.43(d)(4)(i) of the rules[6] because Partnership commenced construction prior to the expiration of the 60-day period. Braley argues that the 60-day waiting period began with the April 30, 1990 Public Notice announcing Partnership as the tentative selectee, and expired on June 30, 1990. Accordingly, Braley asserts that Partnership may not invoke the preconstruction exception because it had fully constructed two of the proposed sites as early as May 21, 1990, and a third site as early as May 31, 1990. Braley also alleges that Partnership apparently constructed the towers at Kiser Hill and Massanutten Peak before receiving FAA antenna clearances and Commission antenna marking and lighting specifications, in violation of Sections 22.43(d)(3), (as it relates to Section 22.43(d)(4)), 22.109(a), 22.923(b)(4) and Part 17 of the rules, and the terms of a 90-day special temporary authority (STA) for the construction of microwave facilities at these sites that was issued April 18, 1990.[7] As an alternative to a dismissal or denial of the application, Braley requests that the Commission conduct an evidentiary hearing to determine whether, and to what extent, Partnership has engaged in unlawful premature construction.

5. In its opposition, Partnership contends that Braley's allegations of unauthorized construction are factually incorrect and legally unsound, and that the construction was authorized by Commission precedent under Section 319(a) of the Act and Section 22.43(a)(1) the rules. Partnership denies that the towers are new, owned or constructed by Partnership or its general partner, CFW Cellular. Partnership states that CFW Cellular entered into a lease agreement with the owner of each tower for the use of space for for Partnership's cellular antennas.[8] It also states that the cellular antennas have not been connected to the base station transmitters, the system has not been tested and it has not signed a contract for switching services with the Roanoke wireline cellular licensee. Partnership concedes that cellular equipment buildings were placed at the cell sites on March 8 and 9, 1990,[9] and that electricity is being drawn at the equipment shelters to power the facilities' air conditioning, heating and security systems, but it argues that these steps are permissible under Sections 301 and 319(a) of the Act. Partnership also concedes that antennas and transmission cables were installed at Kiser Hill, Massanutten Peak and College Park Hill on March 14, 1990, April 25, 1990 and May 16, 1990, respectively. It contends that such steps are permissible under the Commission's rules because the antennas are not connected to the base station transmitters. Partnership further concedes that microwave equipment was mounted on the towers at College Park Hill and Massanutten Peak, but states that the construction of the microwave facilities was authorized by the 90-day STA issued on April 18, 1990.[10] Finally, Partnership admits that on March 10, 1990, CFW Telephone Company (CFW

Telephone), the owner of the tower at Kiser Hill and an affiliate of CFW Cellular, "increased the height of its tower at Kiser Hill by 20 feet in order to provide space required under the terms of its lease with CFW Cellular." Opposition, Exh. 3, at 2.

6. Partnership argues that the construction at the three sites was authorized by the exception set forth in Section 22.43(d)(4)(i) of the rules. It states that the 60-day period ran from the March 21, 1990 Public Notice until May 21, 1990. Because no petitions to deny had been filed during that time period, it claims that it was authorized to begin construction on May 21, 1990.[11] In response to Braley's claim that at least two towers were constructed without the proper FAA and Commission antenna clearances, Partnership counters that it neither constructed nor owns the two towers. Partnership also submits evidence that the FAA clearances for all three towers have been granted and forwarded to the Commission.

7. *Discussion.* Under Section 319(a) of the Act and Section 22.43(a) of the rules, a cellular applicant generally is prohibited from commencing station construction prior to receipt of Commission authorization. The preauthorization construction of towers, installation of radio antennas and mounting of microwave equipment is encompassed by this prohibition. *MCI Telecommunications Corporation*, 3 FCC Rcd 509 (1988), *as supplemented*, 4 FCC Rcd 7299 (1988), *appeal dismissed by judgment sub nom. TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990) (Table). The prohibition on premature construction, however, is not absolute. The following preauthorization steps, *inter alia*, have been permitted: installing a tower base and anchors; installing a new power line; purchasing and storing, on-site, radio equipment; pouring concrete footings; clearing a transmitter site; constructing a transmitter building and other "preliminary steps" not having an "intrinsic" radio communications use "related to the facility." *See id.*, 3 FCC Rcd at 509; *Western Tele-Communications, Inc.*, 3 FCC Rcd 6405 (1988), *appeal dismissed by judgment sub nom. TeleStar, Inc. v. FCC*, 899 F.2d 1268 (D.C. Cir. 1990) (Table); *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd 6404 (1987); *King Country Broadcasters*, 55 Rad. Reg. 2d 1591, 1592 (1984), *overruled on other grounds, Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd 6404 (1987); *Patton Communications Corporation*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting Corp.*, 24 Rad. Reg. 669 (1962). Section 22.43(d)(4)(i) of the rules provides an additional exception to the general prohibition against preauthorization construction for cellular services, *see* note 6, *supra*. In assessing the actions taken by Partnership, we apply these legal standards.

8. Partnership, by mounting cellular antennas and installing transmission cables at the Kiser Hill, Massanutten Peak and College Park Hill proposed cell sites, furthers an intrinsic radio purpose directly related to its proposed facilities. *MCI*, 3 FCC Rcd at 509, 510 ("the placement. . . of . . . antennas on . . . tower[s] constitute[s] unauthorized construction"); *WSAV, Inc. and WJIV-TV, Inc.*, 10 Rad. Reg. 402 (1955), *affirmed sub nom. WJIV-TV, Inc.*, 231 F.2d 725 (1956). Similarly, the increase in height of the tower at Kiser Hill by CFW Telephone, pursuant to its lease with with CFW Cellular (*see* para. 5, *supra*), serves an intrinsic radio purpose directly related to the proposed cellular facility. Partnership is subject to the Commission's rules with respect to this increased tower height construction, undertaken by CFW Telephone in furtherance of Partnership's application. In any event, we note that CFW Telephone is an affiliate of CFW Cellular, Partnership's principal owner, and shares the same management with CFW Cellular, a fact which Partnership itself relies on in a slightly different context. *See* para. 12, *infra*.[12] Partnership admits that it engaged in these various construction activities at the Kiser Hill, Massanutten Peak and College Park Hill locations prior to May 21, 1990, less than 60 days from public notice of the sole eligible wireline applicant, the earliest of the dates specified by Section 22.43(d)(4)(i). Therefore, Partnership may not invoke the exception set forth in Section 22.43(d)(4)(i).[13] In view of the foregoing, we find that Partnership has engaged in unlawful preconstruction under Section 319(a) of the Act and Section 22.43(a) of the rules.

9. Partnership's placement of cellular equipment buildings containing unconnected base station transmitters at the three proposed sites, on the other hand, constitutes a permissible preliminary step under Section 319 of the Act and Section 22.43(a) of the rules. *MCI*, 3 FCC Rcd at 509; *Western Tele-Communications, Inc.*, 3 FCC Rcd at 6406 ("purchase and on-site storage of radio equipment . . . and construction of a transmitter building . . . constitute permissible preauthorization construction"). Further, Partnership may take necessary and reasonable steps to protect equipment when it is placed at the proposed site. Thus, Partnership's connection of electric lines to the buildings to supply power for alarms, air conditioning and heating similarly constitutes a permissible preliminary step. Because Partnership's statement that construction of the microwave facilities at the Masanutten Peak and College Park Hill sites occurred following receipt of the STA is uncontroverted, we deny Braley's claim of unauthorized preconstruction with respect to these microwave facilities. Therefore, we find that Partnership's construction of microwave facilities at Massanutten Peak and College Park Hill constitutes permissible construction, as authorized by the STA grant of April 18, 1990. With respect to the STA itself, we note that Braley did not file a petition for reconsideration or application for review and, thus, the STA has become final and unappealable. In any event, there is no support for Braley's speculation that the STA request was not filed in good faith.

10. In evaluating Braley's request for a hearing on the issue of unauthorized preconstruction, we apply the two-prong test established in Sections 309(d)(1) and (2) of the Act. *See Astroline Communications Company Limited Partnership*, 857 F.2d 1557 (D.C. Cir. 1988.); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). Although Braley has raised specific allegations of fact sufficient to present a *prima facie* case that there has been unlawful premature construction, there is no substantial and material question of fact on the issue of premature construction and its effect on Partnership's qualifications requiring the conduct of an evidentiary hearing under Section 309(d)(2). As discussed above, the facts regarding the installation of transmission cables, placement of cellular equipment buildings, and mounting of cellular antennas and microwave equipment are uncontroverted. In addition, Partnership has admitted that the tower height was increased at Kiser Hill. Further, Partnership has submitted sufficient evidence in its affidavits to establish when and by whom the towers were constructed at the three sites. *See* note 8, *supra*. As a result of these facts, we are able to reach the

legal conclusion that Partnership engaged in unlawful premature construction. *See* para. 8, *supra*. As discussed below, we do not believe these violations affect Partnership's qualifications to be a Commission licensee. In the absence of a basis on which to order a hearing, we deny Braley's request.

III. CHARACTER QUALIFICATIONS

11. *Contentions*. Braley argues that because Partnership is composed of landline companies with working knowledge of the Act and the rules, Partnership's unlawful preconstruction compels the Commission to find that it does not have the requisite character qualifications to be a Commission licensee.

12. In response, Partnership states that the record of CFW Telephone before the Commission and the Virginia State Commission Corporation (SCC) demonstrates Partnership's adherence to Commission rules and commitment to customer service. Partnership states that CFW Telephone is an affiliate of CFW Cellular and shares the same management with that company. Partnership submitted a report from the SCC in which CFW Telephone is rated "satisfactory" on all service quality results for the first quarter of 1990. Partnership explains that a "satisfactory" rating is the highest made by the SCC. Opposition, p. 4, n. 2.

13. *Discussion*. In resolving a request for an inquiry into an applicant's basic character qualifications to be a Commission licensee, the Commission focuses on "the likelihood that . . . [t]he applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies." *Policy Regarding Character Qualifications in Broadcast Licensing (Policy Statement)*, 102 FCC 2d 1179, 1183 (1986), *on recon.*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987). *See also Policy Regarding Character Qualifications in Broadcasting Licensing*, 5 FCC Rcd 3252 (1990), *recon. pending*.[14] Although any violation of the Communication's Act or the rules raises character concerns, "not all violations are equally predictive of future reliability and truthfulness." *Policy Statement*, 102 FCC 2d at 1210, n. 76. In determining the relevance and weight to accord improper activites with respect to the ability to operate a proposed facility in the public interest, the Commission considers such factors as "whether the misconduct was isolated or recurring, inadvertent or deliberate, and recent or remote." *Id.* at 1226. In the case before us, we are mindful of the absence of any evidence of misrepresentation or lack of candor by Partnership. *MCI*, 3 FCC Rcd at 514 (petition for revocation denied where violations were isolated and apparently inadvertent, and there was "no evidence of misrepresentation or lack of candor . . . or any intention to violate [the] Rules or the Communications Act").[15] We also are mindful of Partnership's claim that installation of the various cellular antennas was undertaken on the mistaken belief that "it was permissible under the Commission's rules . . . so long as the antennas were not connected to the base station transmitters . . . ." Opposition at 12. Further, Partnership has provided evidence of CFW Telephone's satisfactory compliance with other regulatory rules and standards. *See* para. 12, *supra*. While Partnership's premature construction is a serious violation of the Act and the rules, there is nothing in the record to suggest a likelihood that in the future it will not deal truthfully with the Commission and comply with the Act and the Commission's rules and policies. Therefore, we cannot find that Partnership's conduct warrants an inquiry into its basic qualifications to be a Commission licensee. Accordingly, we find Partnership to be legally, technically, financially and otherwise qualified to be a Commission licensee. Moreover, we find that a grant of the instant application will serve the public interest, convenience and necessity.

IV. NOTICE OF APPARENT LIABILITY

14. As discussed above, Partnership engaged in unlawful premature construction by installing cellular antennas and transmission lines at two proposed cell sites, and by installing cellular antennas and transmission lines and increasing the height of a tower at a third proposed cell site, in violation of Section 319(a) of the Act and Section 22.43(a)(1) of the rules. Partnership's violations were both willful and repeated within the meaning of Section 503(b)(1) of the Act. Although we find that Partnership's violations as set forth above are not sufficient to establish that it does not possess the requisite character qualifications to be a Commission licensee, we admonish Partnership to exercise henceforth greater diligence toward complying with the Commission's rules. In addition, we choose not to exercise our discretion to order dismantlement of the facilities constructed without authorization under Section 22.43(d)(5)(iii). In this case, we believe that the expeditious provision of telecommunications services to the public outweighs any benefits of dismantlement under the rule.[16] However, we find that Partnership's overall conduct and failure to exercise reasonable care in complying with the prohibitions of our rules warrants imposition of a forfeiture with respect to the unlawful construction activities at each of its three proposed cell sites.

15. In determining the amount of the forfeiture to be imposed, we have taken into account "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. Section 503(b)(2). In consideration of the serious nature of the violations and CFW Telephone's record of performance with the SCC, *inter alia*, we find that Partnership is apparently liable for a forfeiture in the amount of $20,000.00 with respect to each of the three proposed sites. Accordingly, Partnership is apparently liable for a forfeiture in the total amount of $60,000.00.

V. ORDERING CLAUSES

16. IT IS ORDERED, pursuant to Section 503(b) of the Act and Section 1.80 of the rules, That Virginia RSA 6 Cellular Limited Partnership IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of $60,000.00, for unauthorized premature construction in violation of Section 319(a) of the Act and Sections 22.43(a)(1) of the rules.

17. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the rules, That Virginia RSA 6 Cellular Limited Partnership, within thirty days of the release date of this notice, shall pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or the amount should be reduced. The for-

feiture should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, FCC, Box 19209, Washington, D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That the Application of Virginia RSA 6 Cellular Limited Partnership, File Number 10880-CL-P-686-B1-89, IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Virginia 6-Highland RSA. The authorization is conditioned upon coordination with current and future co-channel licensee(s) in the areas outside the Virginia 6-Highland RSA. Further, Virginia Limited Partnership is on notice that in the event current or future MSA/RSA licensees encounter interference from any service extension(s), Virginia Limited Partnership will have to change frequencies in those cells or reduce its 39 dBu contour to eliminate any interference due to an extension.

19. IT IS FURTHER ORDERED, That the Petition to Deny filed by Charles Rease Braley, III is DENIED.

20. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order and Notice of Apparent Liability for forfeiture shall be sent by certified mail to: Virginia RSA 6 Cellular Limited Partnership, (CFW Cellular, Inc.), 54 Woodlee Road, P.O. Box 2008, Staunton, Virginia 24401.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public Notice, Report No. CL-90-50 (released November 24, 1990).

[2] CFW Cellular, Inc. (CFW Cellular) is the sole general partner in Partnership. CFW Cellular owns a 74 percent interest in Partnership. CFW Cellular and all the limited partners (or their affiliated entities) in the partnership provide landline local exchange telephone service in RSA 686.

[3] Public Notice, Report No. CL-90-131 (released March 21, 1990).

[4] Public Notice, Report No. CL-90-165 (released April 30, 1990).

[5] Section 301 of the Act provides in relevant part that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

Section 319(a) of the Act provides in relevant part that "[n]o license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission."

[6] Section 22.43(d)(4)(i) of the rules provides in relevant part that "[c]ellular tentative selectees seeking the initial wireline . . . radio station authorization to be awarded in a cellular market...or the sole surviving wireline applicant after a full market settlement, to apply for the initial wireline authorization in a cellular market . . . . [may commence construction] once 60 days have elapsed from the date of public notice announcing the tentative selectee . . . or the sole surviving wireline applicant...."

[7] Letter from Domestic Facilities Division to CFW Cellular, Inc. (May 9, 1990) (granting STA from April 18, 1990 through July 18, 1990, "to construct the microwave facilities . . . ").

[8] In sworn affidavits submitted with its opposition and in a response (filed on August 27, 1990) to an August 20, 1990 Commission request for additional information, Partnership states that the tower at Kiser Hill was erected by CFW Telephone Company on May 9, 1988 to provide paging and IMTS service; the tower at Massanutten Mountain was erected by Stonewell Broadcasting Company in January of 1990 to provide radio broadcasting, and currently is owned by Great Eastern Associates; the tower at College Park Hill was erected by Staunton Video Corporation in 1983, and currently is owned by Adelphi Cable Corporation.

[9] The buildings were delivered to Partnership with the base station transmitter equipment "already installed in modular format." Opposition, Exh. 3, at 3.

[10] Microwave facilities are used to interconnect cells and/or switching locations with cell sites. They are not used to provide direct communications between cells and cellular service subscribers.

[11] In addition, Partnership asserts that Braley's petition to deny was untimely filed. Section 1.823(b)(2) of the rules provides that "[i]n the Cellular Service, Petitions to Deny may be filed . . . within 45 days of the Public Notice announcing such selection." Partnership's assertion is without merit. *See also* Public Notice, note 4 *supra*, which specified that petitions were due June 18, 1990.

Partnership also disputes Braley's claim that he has standing to file a petition to deny. We find that Braley, as a nonwireline cellular tentative selectee for the same market, has standing to file the instant petition to deny under Section 22.30(a)(3). *FCC v. Sanders Brothers*, 309 U.S. 477 (1940).

Partnership further alleges that Braley's petition is a disguised headstart petition and, as such, should be summarily dismissed. In a headstart petition, a nonwireline carrier requests deferral of initiation of service by the wireline carrier for a brief period of time not to exceed six months. *See* Cellular *Communications Systems*, 89 FCC 2d 58, 74, 75 and n. 32 (1982). As the discussion *infra* makes clear, Braley's petition raises questions of fact (regarding preconstruction at the proposed cellular sites) which do not involve market protection issues. Partnership's allegation, therefore, is rejected.

[12] The record evidence convinces us that Partnership did not construct the towers located at the proposed cell sites and that the towers were not constructed for Partnership in furtherance of its application. *See* note 7, *supra*. For this reason, Braley's argument with regard to FAA approval, *see* para. 4 *supra*., is without merit. Partnership inaccurately states in its Amended Application (filed on March 22, 1990) that a "new structure" is to be constructed at both the Kiser Hill and Massanutten Peak proposed cell sites. Amended Application, Exh. 3, Sch. B, numbers 1 and 3, at 3, item 35. We admonish Partnership to exercise greater care in the preparation of its Commission submissions.

[13] Because we find that Partnership commenced construction at the three sites prior to expiration of the 60-day period, we need not address Braley's request that the Commission issue a restraining order *pendente lite* denying Partnership the benefit of the pre-grant exception. *See also* Letter to Peter A. Rohrbach, Esq. from the Mobile Services Division (December 20, 1990)

(granting Partnership an STA from December 18, 1990 to January 18, 1991 to install equipment and conduct system testing at the three sites).

[14] Although not directly applicable to common carriers, the character qualifications standards adopted in the broadcast context can provide guidance in the common carrier area as well. *See MCI*, 3 FCC Rcd at 515, n. 14; *Policy Statement Recon. Order*, 1 FCC Rcd at 424.

[15] *Cf. TeleSTAR, Inc.*, 2 FCC Rcd 5 (Rev. Bd. 1987), *affirmed*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (1989) (Table), *cert. denied*, (Case No. 89-1770, October 1, 1990) (applicant who had misrepresented material facts and displayed a lack of candor in explaining its premature construction was not qualified to be a Commission licensee); *Pass Word, Inc.*, 76 FCC 2d 465 (1980), *affirmed*, 673 F.2d 1363, 1365 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 840 (1982) (revocation upheld based on "a series of *knowing and deliberate* material misrepresentations to the agency") (emphasis in the original).

[16] Any competitive advantage which Partnership may have gained over Braley by constructing prior to the expiration of the 60-day period under Section 22.43(d)(4)(i) has been eliminated by the filing of Braley's petition to dismiss. Accordingly, Braley's request that Partnership's prematurely constructed facilities be dismantled to ensure Partnership does not benefit from its premature construction is denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-38
REISSUED

In re applications of

MOUNTAIN MEDIA, INC. (hereafter MMI) — File No. BPH-851018MC

SELECTRONICS CORPORATION (hereafter Selectronics) — File No. BPH-851018MD

RADIO VERMONT, INC. (hereafter RVI) — File No. BPH-851018ME

For a Construction Permit
for a New FM Station on
Channel 241A in Warren, Vermont

HEARING DESIGNATION ORDER

Adopted: March 11, 1988; Released: March 16, 1988

By the Chief, Audio Services Division:

1. IT IS ORDERED, That the previous hearing designation order released in this proceeding, MM DOCKET NO. 88-38, released February 19, 1988, is hereby VACATED and REISSUED with revisions having been made. This action is taken pursuant to 47 C.F.R. § 1.113(a).

2. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

3. *Preliminary Matters. MMI.* On October 18, 1985, MMI filed its application for a new FM station in Warren, Vermont, and on March 24, 1986, the Chief, FM Branch returned that application as inadvertently accepted for tender. Thereafter, on April 23, 1986, MMI filed a timely Petition for Reconsideration which was granted by letter on February 13, 1987. MMI was subsequently reinstated *nunc pro tunc* and accepted for filing on March 4, 1987.

4. On April 3, 1987, Selectronics filed a timely Petition to Dismiss or Deny MMI's application. Selectronics alleges in its Petition that MMI's proposed transmitter site is short-spaced to station CJFM-FM, Montreal, Quebec, Canada, in violation of 47 C.F.R. § 73.207, the *Canadian-United States FM Broadcasting Agreement of 1947* and the *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels 201 - 300 Under the Canadian-U.S. FM Broadcasting Agreement of 1947* (Adopted September 7, 1984) ("*Working Arrangement*").

5. The Warren, Vermont allotment, for which MMI is applying, is for Channel 241A. CJFM operates on first adjacent Channel 240C1. Section 73.207 of the Commission's Rules and the *Working Arrangement* require a minimum separation between a Class A station and a first adjacent Class C1 station of 164 kilometers. The spacing between MMI's proposed site and CJFM's transmitter site is 161.9 kilometers and is thus short-spaced by 2.1 kilometers.

6. On April 16, 1987, MMI filed a timely Opposition to Seletronics' Petition to Dismiss or Deny. MMI, in its Opposition, asserts that it is in compliance with the *Working Arrangement*. MMI bases its argument on Section 3.5 of the *Working Arrangement* dealing with specially negotiated short-spaced allotments and assignments. MMI argues that Section 3.5 of the *Working Arrangement* allows the Commission to negotiate any proposed assignments which do not conform to the minimum spacing requirements with Canadian stations. Thus, a short-spacing problem between a Canadian station and a U.S. station should be treated differently than between two domestic stations. MMI is correct that the *Working Arrangement* treats short-spacing between the U.S. and Canada slightly differently than the Commission's Rules treat short-spacing between two domestic stations. The US/Canada *Working Arrangement*, allows the Commission to submit the technical data of any applicant short-spaced to a Canadian FM broadcast facilty to the Canadian Department of Communications, even in the absence of a request for a waiver, for clearance. Unlike the US/Mexico agreement, which does not have provisions for allowing the Commission to request clearance from the Mexican Government, the US/Canada *Working Arrangement* allows a short-spaced application to be designated for hearing if Canada has no objection and the Commission finds no objectionable interference within the U.S. In the instant case, the Canadian Government cleared MMI's proposed site on March 26, 1987 with no objection.

7. With clearance from the Canadian Department of Communications and with the Commission's technical study finding no unacceptable interferance within the U.S. borders, the Commission cannot find MMI's application objectionable nor unacceptable. Therefore, the Petition to Dismiss or Deny filed by Selectronics will hereby be denied.

8. *Site Availability.* MMI advances the argument in its Opposition to Selectronics' Petition to Deny that the other applicants do not have acceptable sites. MMI's allegations are essentially attempts to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in MMI's allegations would not ordinarily be considered in the Hearing Designation Order. Because of the unique circumstances presented with the submission of a Settlement Agreement, to be discussed in Paragraph 12, below, it was necessary to consider the issues raised by MMI in order to make a determination as to the acceptability of the proposed Agreement. MMI's first allegation in its Opposition, considered herein because of the singular situation at hand, is that there will be "severe adverse local reaction" to Selectronics' site. In the first instance, MMI's argument is too speculative to require an issue "Reasonable assurance" does not require zoning approval prior to grant of an

application. *Gareth F. Garlund and Anna White Garlund (KIQO)*, 69 FCC 2d 2006 (1978) Further, a sworn affidavit regarding the likelihood of local opposition by MMI's own attorney is unpersuasive.

9. MMI does, however, raise significant questions of fact regarding RVI's site which go directly to the acceptability of the proposed Settlement Agreement discussed in paragraph 12, below. In its Opposition to Selectronics' Petition to Dismiss or Deny, MMI asserts that the property on which RVI has proposed to construct its transmitter has been sold and the new owners have not been contacted. RVI subsequently notified the Commission on August 6, 1987, by a Motion for Leave to Amend and an accompanying amendment, that its site had indeed been lost. As of this date, RVI has not yet submitted any new site on which RVI proposes to construct its transmitter. On August 20, 1987, MMI filed a timely Objection to RVI's Motion for Leave to Amend. MMI makes numerous allegations in its Objection which go directly to RVI's candor in this proceeding. The thrust of MMI's argument is that RVI knew by April 16, 1987, at the latest, that its site had been lost, since that is when MMI pointed out that fact in its Opposition pleading against Selectronics' Petition. Therefore, RVI knew that its site was no longer available three and one-half (3-1/2) months prior to RVI's amendment informing the Commission. Furthermore, First Vermont Bank, the current owner of the land, gained possession of the site more than eight (8) months prior to RVI's amendment. MMI argues that RVI has failed to show "good cause" for such a delay in apprising the Commission of such changes. MMI also raises questions of fact concerning RVI's original site certification. The individual signing RVI's original site certification was Walter A. Zinn. Although Mr. Zinn signed RVI's certification on October 15, 1985, MMI alleges that Mr. Zinn had sold the site on October 6, 1981, more than four years prior to the filing of RVI's application. According to MMI, David and Rene Disick, the owners of the land from October 6, 1981 until October 26, 1986, who owned the site at the time of filing, were never contacted by RVI. The Disicks sold the land to its current owner, First Vermont Bank on October 26, 1986. First Vermont Bank, MMI alleges, has also not been contacted about using the site for a transmitter. All of MMI's allegations in this regard are uncontroverted by RVI. Therefore, although MMI's allegations directed towards Selectronics are unsupported by affidavits, being undisputed by RVI, the allegations do raise a question sufficient to warrant the specification of an appropriate site availability issue. Furthermore, the Commission has held that a contingent misrepresentation issue should be specified for hearing in circumstances similar to those found here. *See e.g., Dutchess Communications Corp.*, 101 FCC 2d 243, 58 RR 2d 381 (Rev. Bd. 1985); *Cannon Communications Corp.*, 101 FCC 2d 169, 58 RR 2d 950 (Rev. Bd. 1985), *review denied*, FCC 86-244 (May 15, 1986); *Houston Family Television, Ltd.*, 101 FCC 2d 661, 58 RR 2d 1557 (Rev. Bd. 1985). Accordingly, an appropriate contingent misrepresentation issue will be specified regarding whether RVI failed to comply with 47 C.F.R. § 1.65 with respect to its site availability and timely report the above matters to the Commission.

10. *MMI.* Engineering study indicates that this proposal may significantly exceed the ANSI C95.1-1982 exposure guidelines for human exposure to radio frequency ("RF") radiation in the transmitter building as outlined in OST Bulletin No. 65 (October 1985). Consequently, the Commission is concerned that MMI may have failed to comply with the newly revised environmental criteria forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 22, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant enviromental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since MMI's proposal may have a significant enviromental impact as defined by 47 C.F.R. § 1.1307, it will be equired to submit the enviromental impact information described in 47 C.F.R. § 1.1311. Accordingly, MMI will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the enviromental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

11. *Selectronics.* On October 16, 1987, Selectronics filed a Petition for Leave to Amend and an accompanying amendment proposing a new transmitter site, explaining that Selectronics' originally proposed site is no longer available. Selectronics explains that through no fault of its own, the landowner of the originally proposed site unilaterally withdrew the option for Selectronics to construct. Selectronics' October 16, 1987, Petition for Leave to Amend contains nothing more than a bare allegation by its attorney and a signed statement by the president of Selectronics that the information contained within the Petition is true. We find that this does not suffice as good cause for us to accept a late-filed amendment. Bare assertions without accompanying supporting affidavits cannot be regarded as establishing good cause for acceptance under any set of criteria. Selectronics' Petition for Leave to Amend is therefore denied and the accompanying amendment is hereby returned.

12. On October 22, 1987, RVI and Selectronics filed a Joint Request for Approval of Agreement. Under the terms of the Agreement, Selectronics would dismiss its application for the grant of RVI's application. In light of the matters discussed in paragraph 12, above, and the resultant contingent issue specified below, we do not find that approval of this agreement would serve the public interest. Therefore, approval of the Joint Agreement is denied, Selectronics application will not be dismissed, and both RVI's and Selectronics' applications are designated for hearing.

13. *Other Matters.* The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative

position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
RVI	March 30, 1987; August 6, 1987

14. Data submitted by the applicants indicates that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to MMI in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.301-1319.

2. (a) To determine whether RVI has reasonable assurance that the transmitter site specified will be available to it.

(b) To determine, in light of the facts and circumstances adduced pursuant to issue 1(a) above, whether RVI timely apprised the Commission of site availability pursuant to 47 C.F.R. § 1.65.

(c) To determine, in light of the facts and circumstances adduced pursuant to issues 1(a) and 1(b), above, whether RVI misrepresented facts to or concealed information from the Commission.

(d) To determine, in light of the facts adduced pursuant to the foregoing issues, whether RVI possesses the the basic qualifications to be the licensee of the facilities sought here.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest;

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the Petition to Dismiss or Deny filed by Selectronics IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That in accordance with paragraph 10 heeinabove, MMI shall submit the environmental assessment required by 47 C.F.R. § 1.311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RVI on March 30, 1987, and August 6, 1987, ARE HEREBY GRANTED, and the corresponding amendments ARE HEREBY ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That the October 16, 1987 petition for leave to amend filed by Selectronics IS DENIED, and the corresponding amendment IS HEREBY RETURNED.

21. IT IS FURTHER ORDERED, That the October 22, 1987 Request for Approval of the Joint Agreement filed by RVI and Selectronics IS HEREBY DENIED.

22. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on Chief, Date Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 15, 1991

SOUTHWESTERN BELL TELEPHONE COMPANY FILES PETITION FOR WAIVER OF PART 69 OF THE COMMISSION' S RULES REGARDING INTERSTATE DIRECTORY ASSISTANCE SERVICE

Pleading Cycle Established

On December 3, 1990, the Southwestern Bell Telephone Company (Southwestern) filed a petition for waiver of Part 69 of the Commission's Rules to permit establishment of a new rate element within the Information category. The new rate element would enable Southwestern to separate a portion of the expense of white page directory publication from the expense of providing interstate directory assistance (IDA) service.

Interested parties should file comments regarding Southwestern's waiver petition no later than January 29, 1991. Reply comments concerning the waiver petition may be filed no later than February 5, 1991.

Parties are requested to furnish one copy of each pleading to the Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the Southwestern waiver petition, along with other related documents, may be obtained from DCC. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all pleadings and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone & Telegraph Co. Revisions to Tariff F.C.C. No. 40	Transmittal No. 1095
New York Telephone Co. Revisions to Tariff F.C.C. No. 41	Transmittal No. 1089
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1505
Southwestern Bell Telephone Co. Revisions to Tariff F.C.C. No. 68	Transmittal No. 2031
U S West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 119

ORDER

Adopted: January 9, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

1. New England Telephone and Telegraph Company, New York Telephone Company, Pacific Bell, Southwestern Bell Telephone Company, and U S West Communications (the BOCs) have filed the captioned tariff revisions which amend the definition of the term "channel termination" as used in their tariffs for Special Access service. These tariff revisions are scheduled to become effective January 13, 1991. The BOCs filed the captioned revisions after the Commission found that the currently-effective definition of a channel termination contained in their Special Access tariffs did not apply to intrabuilding circuits.[1] Metropolitan Fiber Systems (MFS) has filed a petition requesting suspension and investigation of the captioned filings and each of the BOCs has filed a reply.

2. MFS asserts that the BOCs have failed to justify the proposed definitional changes. MFS contends that the BOCs have made no attempt to demonstrate that rates for intrabuilding circuits are designed to reasonably reflect cost differences among subelements as is required by Section 69.114(d) of the Commission's Rules, 47 C.F.R. § 69.114(d). MFS Petition at 4-5. In addition, MFS asserts that intrabuilding circuits are functionally different from other channel terminations and contends that the BOCs have not justified charging the same rates for them. *Id.* at 5-7. Finally, MFS asserts that these transmittals raise important policy issues of the BOCs' ability to disadvantage their competitors through their control of bottleneck facilities. *Id.* at 7-8.

3. NYNEX's reply is typical of the BOCs' responses to MFS's petition.[2] NYNEX notes that the Commission stated in the *Western Union Order* that it should be simple for the BOCs to include intrabuilding circuits in the channel termination definition by revising their tariffs as they now have done. NYNEX Reply at 2-3. NYNEX further states that MFS incorrectly assumes that intrabuilding circuits are a separate subelement of Special Access. *Id.* at 4. In addition, NYNEX argues, intrabuilding circuits provide the same functionality as other channel terminations, *i.e.*, a communications path between two customer designated premises. *Id.* at 5-6. Finally, NYNEX asserts that MFS has not shown that the pending tariff revisions would be harmful to competition. *Id.* at 7.

4. The Common Carrier Bureau has reviewed the captioned transmittals, MFS's petition, and the BOCs' replies. We conclude that no question has been presented that warrants suspension or investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate the captioned transmittals filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Western Union Corp. v. Southern Bell Tel. & Tel. Co., File Nos. E-87-47 through E-87-53, 5 FCC Rcd 4853 (1990) (*Western Union Order*).

[2] Because the NYNEX reply is typical of the BOC responses, it is the only one summarized in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2 — Transmittal No. 478

ORDER

Adopted: January 10, 1991; Released: January 10, 1991

By the Chief, Common Carrier Bureau:

1. On October 12, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 478 to introduce a charge for unauthorized primary interexchange carrier (PIC) changes. Currently, Ameritech imposes a $5.00 PIC change charge payable by the end user at the time the end user authorizes a PIC change. Ameritech imposes a $5.00 charge on the interexchange carrier (IC) if the IC claims an end user requested a PIC change, and that change is later found to be unauthorized. Ameritech plans to increase the charge for these unauthorized PIC changes to $23.00 for business and residential accounts, and $52.30 for payphone accounts. US Sprint Telecommunications Company Limited Partnership (Sprint) filed a petition for rejection or suspension and investigation, and Ameritech filed a reply. Transmittal 478 is scheduled to take effect on January 10, 1991.

2. Ameritech intends to retain the existing $5.00 charge for authorized PIC changes. Ameritech Transmittal No. 478, Description and Justification (D&J) at 1-2. It contends that the current $5.00 charge does not compensate Ameritech for the costs it incurred in investigating disputed PIC changes. *Id.* at 2-3. Ameritech asserts that it developed its rates using the Task Orientation Costing (TOC) methodology. *Id.* at 5. Ameritech proposes to charge $18.00 for investigations relating to business and residential accounts, $31.70 for investigations relating to payphone accounts, and $15.60 per location for visiting the payphone premises, in addition to the existing $5.00 charge. *Id.* at Exh. 4.

3. According to Sprint, interexchange carriers (ICs) could incur Ameritech's unauthorized PIC change charge whenever the IC could not produce a letter of agency (LOA), even though the PIC change might be legitimate. Sprint maintains that Ameritech's charge would give Ameritech an incentive to find all disputed PIC changes to be unauthorized. *Id.* at 5.

4. Sprint also maintains that Ameritech has not made an adequate showing of the labor time required to perform the functions associated with PIC change investigations.[1] It suggests that Ameritech should be required to perform a time and motion study. *Id.* at 7. Sprint also argues that Ameritech has not explained why the investigations for payphone PIC changes are more costly than the investigations for PIC changes relating to business and residential accounts. *Id.* at 7-8. Sprint alleges that the total charge for an unauthorized payphone PIC change under Transmittal 478 would be $52.30, an amount which is significantly higher than the PIC change charges imposed by Bell Atlantic and BellSouth.[2] *Id.* at 2. Sprint asserts that BellSouth and Bell Atlantic found that the only additional cost associated with payphone PIC changes result from the trip to the payphone site. *Id.* at 8.

5. Ameritech replies that the Commission placed the responsibility on ICs for producing LOAs in the event of a PIC change dispute, and that Sprint attempts to shift some of this responsibility away from itself. Ameritech Reply at 3-4, *citing* Illinois Citizens Utility Board Petition for Rule Making, 2 FCC Rcd 1726 (1987). Ameritech argues that it has provided the same level of cost support information as that previously supplied by Bell Atlantic and BellSouth for their unauthorized PIC change charges. *Id.* at 5-6. Also, Ameritech asserts that its rates are developed on a per location basis rather than the per line basis used by Bell Atlantic and BellSouth to develop their rates. Ameritech alleges that its rates computed on a per line basis in the case of payphone PIC changes would be $44.50, which it claims to be similar to BellSouth's and Bell Atlantic's rates. *Id.* at 6 n.13.

6. We have examined Sprint's petition, Ameritech's reply, and related materials in the record, and we conclude that the transmittal is not so patently unlawful as to require rejection and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 478, filed by US Sprint Telecommunications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In response to Sprint's assertions regarding inadequate data regarding labor costs, Ameritech supplied additional cost information to the Bureau on December 19, 1990.

[2] Sprint asserts that Bell Atlantic's unauthorized payphone PIC change charge is $39.96, and BellSouth's unauthorized payphone PIC change charge is $35.68.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-460

In the Matter of

Amendment of Section 73.202(b),	RM-7377
Table of Allotments,	
FM Broadcast Stations.	
(Van Buren, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 6244 (1990), issued in response to a petition filed on behalf of LKR Communications, Inc. ("petitioner"), licensee of Station KLSZ-FM, Channel 272A, Van Buren, Arkansas, proposing the substitution of Channel 274C2 for Channel 272A, and modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 274C2 can be allotted to Van Buren, Arkansas, at the petitioner's specified site, which is located 17 kilometers (10.5 miles) south of the community,[1] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, to avoid a short-spacing to the site specified in the construction permit issued to Station KHOZ-FM, Channel 275C, Harrison, Arkansas, to decrease its facilities to Class C1 standards (*see* File No. BPH-891017IC).[2]

3. We believe the public interest would be served by substituting Channel 274C2 for Channel 272A at Van Buren, Arkansas, since it could provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KLSZ-FM to specify operation on Channel 274C2 in lieu of Channel 272A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Van Buren, Arkansas	274C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to LKR Communications, Inc. for Station KLSZ-FM, Van Buren, Arkansas, IS MODIFIED to specify operation on Channel 274C2 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the petitioner's specified site for Channel 274C2 at Van Buren are 35-17-55 and 94-25-26.

[2] Coordinates at the site specified in the construction permit issued to Station KHOZ-FM are 36-26-11 and 93-14-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-486

In the Matter of

Amendment of Section 73.202(b), RM-7379
Table of Allotments,
FM Broadcast Stations.
(Asbury, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 24, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6447 (1990), issued in response to a petition filed by William Bruce Wachter ("petitioner"). The *Notice* proposed the allotment of Channel 278A to Asbury, Missouri, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 278A to Asbury, Missouri, since it would provide the community with its first FM broadcast service. Channel 278A can be allotted to Asbury in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Asbury, Missouri	278A

4. The window period for filing applications will open on **March 12, 1991,** and close on **April 11, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordiantes for Channel 278A are 37-16-24 and 94-36-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-110

In re Applications of

EMPIRE STATE BROADCASTING CORPORATION (WWKB)
Buffalo, New York

File No. BR-840201WQ

For Renewal of License

BURSAM COMMUNICATIONS CORPORATION (WTHE)
Mineola, New York

File No. BP-840430AC

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1991; Released: January 25, 1991

By the Commission:

1. Before the Commission for consideration is a Review Board Decision, *Empire State Broadcasting Corporation*, 5 FCC Rcd 2999 (Rev. Bd. 1990), affirming a summary decision granting Empire State Broadcasting Corporation's application for renewal of the license of WWKB(AM), and denying the mutually exclusive application of Bursam Communications Corporation to increase the operating power of WTHE(AM). *See Empire State Broadcasting Corporation*, 4 FCC Rcd 7008 (S.D. 1989). After careful consideration of the Review Board decision and the parties' pleadings,[1] we affirm the Board's decision in this matter. We wish, however, to comment on certain matters.

I. BACKGROUND

2. Bursam's proposal to increase the operating power of WTHE(AM) would cause objectionable interference to WWKB(AM) in violation of 47 C.F.R. § 73.187, which limits the signal that WTHE(AM), a Class II AM station, may radiate during critical hours toward a co-channel Class I station.[2] The staff of the Mass Media Bureau denied Bursam's request for a waiver of 47 C.F.R. § 73.187. Bursam's application was tendered during the renewal period filing window for WWKB(AM). Therefore, it was designated for hearing with Empire State's application for renewal of WWKB(AM)'s license since, in the absence of a waiver, the proposals were made mutually exclusive by the interference Bursam's proposal would cause. *See Empire State Broadcasting Corporation*, 2 FCC Rcd 2439 (M.M. Bur. 1987), *vacated and reissued*, 2 FCC Rcd 2793 (M.M. Bur. 1987). The hearing designation order specified a Section 307(b) issue to determine which proposal would better provide fair, efficient, and equitable distribution of radio service. [3] In an interlocutory order, the Review Board directed the ALJ to determine, in addition, whether Bursam was entitled to waiver of 47 C.F.R. § 73.187. *See Empire State Broadcasting Corporation*, 2 FCC Rcd 7554, 7556 ¶ 10 (Rev. Bd. 1987), *erratum*, 3 FCC Rcd 313 (Rev. Bd. 1988). The ALJ found that Bursam failed to justify a waiver of the rule, and that Empire State was entitled to a dispositive preference under the Section 307(b) issue. The Board affirmed the ALJ's Section 307(b) finding, but declined to consider the merits of Bursam's exceptions concerning denial of the waiver. In doing so, the Board questioned whether Bursam's application should have been designated for hearing and whether the waiver issue should have been considered. *See Empire State Broadcasting Corporation*, 5 FCC Rcd at 3002-3 ¶ 11, 3005 ¶ 16.

II. DISCUSSION

3. In light of the questions raised by the Board, we wish to state our views as to the legal principles applicable to this case. Bursam's application to increase the operating power of WTHE(AM) conflicts with the interference protection for Class I stations mandated by 47 C.F.R. § 73.187. However, Bursam's application, timely filed during the renewal period filing window for WWKB(AM), is mutually exclusive with Empire State's renewal application, and therefore was accepted for filing. Pursuant to 47 C.F.R. § 73.3516(e),[4] the mutual exclusivity between Bursam's application to increase operating power and Empire State's renewal application gave Bursam a right to a comparative hearing. *See also*, 47 U.S.C. § 309(e); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). Thus, the staff correctly designated Bursam's application for hearing.[5] *See Ramapo Indian Hills Regional High School District*, 3 FCC Rcd 4859, 4860 ¶ 6 (1988); *Westinghouse Broadcasting Co., Inc.*, 64 FCC 2d 643, 645 ¶¶ 5-6 (1977); *Bronco Broadcasting Co., Inc.*, 50 FCC 2d 529, 531 ¶ 5, 536 ¶ 15 (1974), *recon. denied* 52 FCC 2d 836 (1975).

4. We note however, that Bursam's burden of proof under the Section 307(b) issue to be determined in the comparative hearing is virtually insurmountable. Had the Board not directed the ALJ to consider whether Bursam was entitled to a waiver of 47 C.F.R. § 73.187, the ALJ could have issued a summary decision without a hearing, granting Empire State's renewal, since Bursam concedes that Empire State prevails on the Section 307(b) issue. Oral Argument Tr. 2030-31; 5 FCC Rcd at 3005 ¶ 17. As the Board now acknowledges, no waiver issue should have been tried in the context of the Section 307(b) inquiry. 5 FCC Rcd at 3005 ¶ 16. *See Fort Collins Telecasters, A Partnership*, 60 RR 2d 1401, 1405-6 ¶ 8 (Rev. Bd. 1986), *rev. denied*, FCC 87-172 (May 13, 1987); *Frank H. Yemm*, 39 RR 2d 1657, 1659 ¶¶ 6-7 (1977). Bursam had no right to a hearing on its waiver request, since Bursam failed to make allegations of fact sufficient to justify a waiver of 47 C.F.R. § 73.187; therefore, the staff properly designated no waiver issue for hearing.[6] *See Loves Park Broadcasting Co.*, 8 RR 2d 998, 999-1000 ¶ 5 (1966), *citing Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

5. Similarly, an inevitable summary decision in favor of the incumbent would apparently be the outcome of future renewal challenges in which a Class II station files an

application to improve its facilities that is mutually exclusive with a Class I station's renewal application. We believe that the unnecessary use of hearing procedures does not serve the public interest, and indeed, undermines the Commission's emphasis on efficient use of its limited staff and other resources. *See, e.g., Star Signal Corporation*, 1 FCC Rcd 405, 405-6 ¶ 7 (1986). Accordingly, we direct the Mass Media Bureau to consider appropriate rule changes to permit the summary rejection of renewal challenges such as Bursam's, where allocations rules mandate the outcome of any hearing in favor of the incumbent.

6. However, given Bursam's present right to a comparative hearing, we reaffirm *KPLT* insofar as it mandates a comparison under Section 307(b) between the gains in service area and population that would result from increasing the power of WTHE(AM) and the loss of *all* service by WWKB(AM). We reject Bursam's suggestion that *KPLT* should be modified to permit a comparison of the gains in service resulting from its proposal with *only* the losses in coverage by WWKB(AM) that would result from Bursam's proposal.[7]

7. Although *KPLT* is not cited frequently because few stations seek coverage changes by challenging the renewal of a clear channel facility, it remains good law and has been followed consistently when this kind of renewal challenge is designated for hearing. *See Interstate Broadcasting Company, Inc.*, 2 FCC Rcd 4051 ¶ 7 (M.M. Bur. 1987). The rules governing AM interference do not allow the comparison of gains and losses to resolve AM interference conflicts. Rather, the Commission follows a "go/no-go" approach that categorically prohibits the types of interference set forth in the rules. *See The Audio House, Inc.*, 2 FCC Rcd 3171 ¶ 4 (1987); *Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards and the Relationship Between AM & FM Broadcast Services*, 45 FCC 1515, 1522 ¶¶ 13-15 (1964), *recon. denied*, 4 RR 2d 1567 (1965). *KPLT*'s prohibition against weighing the potential gains in service area and population against the loss of listeners by the clear channel station simply reflects the "go/no-go" approach of the overall AM allocation scheme.

8. Grant of both Bursam's proposed power increase and Empire State's renewal would amount to a *de facto* grant of a waiver of 47 C.F.R. § 73.187 to Bursam, when no waiver issue was designated for hearing and when Bursam was not entitled to a hearing on its waiver request.[8] The remedy Bursam seeks, grant of both applications, conflicts with both the Commission's scheme for the allocation of AM service and the premise that the Commission cannot grant an application which fails to comply with the fundamental protection standards set forth in the rules to the detriment of a station entitled to rely on that protection. *See The Audio House*, 2 FCC Rcd at 3172 ¶ 11. There is no reason to disregard valid rules of general applicability, such as the interference rules, merely because the context is a comparative hearing. *See U. S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202-205 (1956); *Simmons v. FCC*, 145 F.2d 578, 579 (D.C. Cir. 1944); *Rio Grande Family Radio Fellowship*, 28 FCC 2d 326, 328 ¶¶ 8-9 (1971). Consequently, the Section 307(b) inquiry mandated by *KPLT* was correctly followed in this case.

III. ORDERS

9. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed June 22, 1990 by Bursam Communications Corporation IS DENIED; and that the Chief of the Mass Media Bureau IS DIRECTED to take action in accordance with paragraph 5, above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are before the Commission: (1) an Application for Review filed June 22, 1990 by Bursam; (2) an Opposition to the Application for Review filed July 6, 1990 by the Mass Media Bureau; and (3) an Opposition to the Application for Review filed July 9, 1990 by Empire State. Bursam was granted an extension of time, to June 22, 1990, in which to file its application for review. *Empire State Broadcasting Corp.*, FCC 901-60 (Jun. 12, 1990).

[2] The period of critical hours is defined as the two hours after local sunrise and the two hours preceding local sunset. *See* 47 C.F.R. §§ 73.14, 73.187.

[3] Pursuant to *Pillar of Fire*, 2 FCC Rcd 519 (1987), the Section 307(b) issue could be dispositive only if Empire State were not entitled to a renewal expectancy. A contingent comparative issue was also designated.

[4] 47 C.F.R. § 73.3516(e) provides:

> An application for a construction permit for a new broadcast station or for modification of construction permit or license of a previously authorized broadcast station will not be accepted for filing if it is mutually exclusive with an application for renewal of license of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

[5] We disagree with the Board's suggestion in *dicta* that the Bureau's failure to return Bursam's application as unacceptable for filing implied that the Bureau believed that the Commission's interference rules do not apply to applications filed against a license renewal. *See* 5 FCC Rcd 3002-3 ¶¶ 10-11. The cases cited by the Board do not support its observation that all applications which violate interference rules are subject to summary rejection, since those cases do not involve mutually exclusive applications filed during the renewal filing window for an existing licensee. Compare *KPLT, Inc.*, 1 FCC 2d 961 (1965). In KPLT, a daytime-only AM station filed an application to increase its power during the renewal window for a co-channel Class I station. The daytime-only applicant requested a waiver of the interference rules because its proposal would cause objectionable interference to the Class I station. *See* 1 FCC 2d 961 ¶ 2. The Commission denied the waiver request but ordered a hearing because the proposals were mutually exclusive.

[6] Even if a waiver issue had been warranted, we see no error in the ALJ's rejection of Bursam's evidence concerning its waiver request and the ALJ's subsequent denial of a waiver. Bursam contends that 47 C.F.R. § 73.187 is no longer necessary because the importance of interference protection for Class I

stations has declined. However, by attacking the rule itself, Bursam does not advance an appropriate basis for a waiver since a waiver inquiry assumes the rule's validity. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The ALJ properly rejected evidence of Bursam's past programming and community service. Non-technical service related arguments do not justify a waiver of technical "go/no-go" AM allocations standards. *See ICBC Corp. v. FCC*, 716 F.2d 926, 930 (D.C. Cir. 1983). The ALJ was also justified in rejecting evidence Bursam presented to demonstrate that WWKB(AM)'s skywave signal causes interference to its own groundwave signal, since the Commission was aware of the effects of such a distortion zone when it adopted the protection standards for clear channel stations, one of which is 47 C.F.R. § 73.187. *See* 4 FCC Rcd at 7018 ¶ 65. Additionally, the ALJ properly excluded this evidence as untimely, since it was not offered as part of Bursam's direct case. *See General Electric Cablevision Corp.*, 11 FCC 2d 667, 668-69 ¶¶ 3,5 (Rev. Bd. 1968).

[7] In this connection, we note that the area Bursam proposes to serve by increasing its power during critical hours contains no area or population served by fewer than five other aural services and partially served by at least four additional aural services during critical hours. 4 FCC Rcd at 7019. Thus, the public interest benefits of Bursam's proposal are marginal at best.

[8] Bursam also argues that a waiver is appropriate pending the outcome of a Commission Rule Making which concerns the validity of the protection standards of 47 C.F.R. § 73.187. *See Notice of Proposed Rule Making, Review of the Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990). We disagree. Bursam cites *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) as support for its argument. In that case, the Court noted that the Commission had extended *temporary* waivers of the cross-ownership rules while those rules were the subject of a Rule Making. 844 F.2d at 815. The waivers deferred requirements to divest broadcast properties pending a proposal to relax certain provisions of the cross-ownership rules. Here, however, Bursam did not merely seek the temporary deferral of a divestiture, but proposed that a *new* service be authorized contrary to a still valid rule. In any event, the pending Rule Making on AM allocation standards does not contemplate altering the interference protection which Bursam must afford to WWKB(AM). *See Notice of Proposed Rule Making*, 5 FCC Rcd at 4464 ¶ 31 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-351

In re Applications of

NORTHPORT BROADCASTING, INC.	File No. BPH-880913MC
DAVID M. BAUGHN	File No. BPH-880914MT
NORTHPORT COMMUNICATIONS, LTD.	File No. BPH-880915ME
WARRIOR BROADCASTING, INC.	File No. BPH-880915MO

For Construction Permit
for new FM Station,
Channel 264A,
Northport, Alabama

ORDER

Adopted: January 15, 1991; Released: January 25, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. On November 13, 1990, Northport Broadcasting, Inc. filed an Appeal from an Order enlarging issues. Thereafter, all the parties to the case entered into a joint settlement agreement which was recently approved by *Memorandum Opinion and Order*. FCC 91M-86 released January 9, 1991, mooting the appeal before us.

2. ACCORDINGLY, IT IS ORDERED, That the appeal filed November 13, 1990, as supplemented December 7, 1990, by Northport Broadcasting, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re: Applications of

Big Island
Broadcasting
Company, Ltd.

For Authority to Construct Three FM Broadcast Booster Stations

File No. BPFTB-881114TC
Keauhou, Hawaii

File No. BPFTB-881114TD
Puueo, Hawaii

File No. BPFTB-881114TE
Waikii, Hawaii

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 25, 1991

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for construction permits for three proposed new FM broadcast booster stations filed by Big Island Broadcasting Company, Ltd. (Big Island); a request for waiver of Sections 74.1231(h), 74.1232(e), 74.1235(c) and, 74.1237(d) of the Commission's Rules; informal objections filed by Sirius Communications, Inc. (Sirius), permittee of station KLUA(FM), Kailua-Kona, Hawaii; a "response" to the informal objections filed by Big Island; and other relevant pleadings.

2. An FM booster station receives the signal of a full service FM station and simultaneously retransmits that signal to areas that are unable to receive satisfactory service from the co-owned full service station due to intervening terrain obstructions. An FM booster station operates on the same carrier frequency as its primary full service FM station and may operate with up to 20% of the maximum permissible effective radiated power for the class of primary station that it rebroadcasts. An authorization for an FM booster station is granted only to the licensee or permittee of the full service FM station whose signal it rebroadcasts and is permitted to serve only areas within the predicted service contour of that station. Big Island is the licensee of station KIPA(FM), Hilo, Hawaii. The three booster stations will be located outside the service contour (1 mV/m, 60 dBu contour) of station KIPA(FM). Hence, Big Island has requested a waiver of the rules.

3. In support of its waiver request Big Island asserts that its original application for a construction permit for a Class C facility was designated for comparative hearing (MM Docket 87-63). It further asserts that it reached a settlement with the other applicant. Upon approval of that settlement agreement, the Administrative Law Judge granted Big Island's application for the Class C facility. However, when the authorization was issued, it specified a Class C1 facility and not the requested full Class C. Big Island states that it filed a petition for reconsideration because Class C1 facilities would not provide island-wide coverage. At that time Big Island believed it could acquire a site that would permit full-island coverage. After further investigation, Big Island's consulting engineer concluded that a transmitter located at the potential site would not place a city grade signal over any part of Hilo, the city of license. Big Island therefore requested dismissal of its petition for reconsideration. At the same time it continued to search for a suitable site which would permit coverage of the entire island.

4. Big Island now asserts that it cannot locate the transmitter of station KIPA(FM) at a site where it can provide service to more than the limited Hilo area because of the unique terrain of the island of Hawaii. In particular, the island is roughly triangular in shape and consists of five volcanic mountains about 20 miles apart, connected by saddles 3,000 to 7,000 feet high, formed by overlapping lava flows. There are two high mountains located in the middle of the island, Mauna Kea which is approximately 14,000 feet above sea level and Mauna Loa which is 11,000 feet above sea level.[1] However, the University of Hawaii has an observatory located on Mauna Kea. If Big Island were to locate its radio transmitter there, it would interfere with the data being received through sensitive detectors installed on the observatory telescopes. Consequently, it is unable to obtain authorization for use of that site. A potential site on Mauna Loa was located but it is in a national park, where the tower height is restricted to fifty feet above ground level. This would prevent satisfactory broadcast service to Hilo, KIPA(FM)'s city of license. Other sites at high elevations would have similar restrictions.

5. Big Island states that the only alternative is to use a series of boosters to provide the island-wide coverage it contemplated when it filed its Class C application. Since these boosters would extend KIPA's coverage beyond the 1 mV/m service contour of its C1 authorization (but not a hypothetical Class C facility), Big Island seeks a waiver of the rules. Big Island contends that grant of the waiver would serve the public interest. According to its engineering showing, the three boosters will provide the following service: nighttime, a first aural service to 1,346 persons, a second to 426 persons and a third to 11,446 persons;[2] daytime, a second aural service to 1,329 persons and a third to 2,946 persons. Big Island states that this additional service is essential in view of the many natural disasters that occur on the island and the resulting need for at least one station capable of communicating with the island's entire population. In this respect, it submitted a list of natural disasters that have occurred on the Island of Hawaii between October 1983 and September 1988. These include earthquakes, flash floods, tropical storms, waterspouts and volcanic eruptions. Big Island also submitted documentation from the Federal Emergency Management Agency in San Francisco, California, supporting the notion that the Island of Hawaii is unique within the United States for frequency and diversity of its natural disasters. In addition, Big Island provided letters from Mr. Harry Kim, Administrator, Hawaii County Civil Defense Agency, in support of the proposed boosters. Mr. Kim explains that use of the boosters will expand the reach of station KIPA(FM) "to the entire Island, including many areas which currently receive no radio reception." According to Mr. Kim, the boosters will be "extremely beneficial" to

the districts of Kau and Kona, which currently receive little or no local radio broadcasts when the civil defense system is activated.

6. Sirius objects to the waiver request. It states that other broadcast stations licensed by the Commission and not listed by Big Island in its waiver request are operating in areas where Big Island alleged there was no service. In addition, Sirius asserts that there are outstanding construction permits for new service in other areas where Big Island states there is no service. In support of its contentions, Sirius submits a contour map of the broadcast stations serving the relevant parts of the Island of Hawaii which, in its view, demonstrates that the "claims of KIPA as to these areas being unserved are patently false and incorrect." Sirius also argues that boosters will permit station KIPA(FM) to extend its service contour and circumvent the mileage separation requirements of Section 73.207 which could cause interference to co-channel and adjacent channel stations. Sirius explains that this is so because such assignments are allocated on the basis of mileage separation to station KIPA(FM) and not to the booster stations. In addition, Sirius asserts that waiver of the rules would permit Big Island to provide service outside station KIPA(FM)'s 1 mV/m contour without an opportunity for other applicants to apply for the facilities. It would be more appropriate, according to Sirius, for Big Island to petition for Rule Making to allot new channels to the alleged unserved areas and then file applications for construction permits to build full service stations. Sirius claims that Big Island's attempt to extend its service beyond the 1 mV/m contour of station KIPA is closely related to the issues in MM Docket 88-140 [3] where licensee efforts to extend service beyond the 1 mV/m contour of the primary station is being considered and a freeze has been imposed on the acceptance of new and major change applications for commercial FM translator stations. In Sirius' view, even if the Commission determines that the waiver requests are "meritorious," action must be deferred pending the outcome of Docket 88-140.

7. Big Island, in its response, denies the allegations and alleges that the engineering studies submitted with its waiver request considered all licensed stations and outstanding construction permits, including those listed by Sirius. In addition, Big Island contends that the contour map submitted by Sirius does not refute the maps submitted by it (Big Island). Big Island continues to assert that grant of its waiver request would serve the public interest.

8. The purpose of FM broadcast booster stations is to provide service to areas within the primary station's predicted service contour that are not served by the signal of the primary station due to intervening terrain obstructions. The booster rules are designed to assure that booster stations operate in a manner that preserves the existing service areas of the full-service stations they retransmit. FM booster stations are not to be used for competitive purposes to expand the service areas of the primary stations they retransmit. Such use would alter the fundamental secondary fill-in service intended for FM boosters. Applicants for waiver of the booster rules must demonstrate that the goal or results to be achieved by the proposal for which the waiver is sought would serve the public interest and that the same results could not be achieved consistent with the rules by any other means. Applicants must also demonstrate that grant of the waiver request would not undermine the goals and policies the rules were designed to promote. The Commission is obligated to give all waiver requests a "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). However, an "applicant for waiver faces a high hurdle." *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). Applicants requesting waiver of our rules must plead specific facts that demonstrate waiver would serve the public interest.

9. The contour map submitted by Sirius and the contour maps submitted by Big Island show that approximately one-half of the area to be served by KIPA's proposed Puueo booster is presently unserved by any other broadcast station. We thus find no merit in Sirius's allegation that the information submitted by Big Island is false or misleading. Nor do we agree with Sirius's contention that the proposed boosters would cause interference to other FM stations. There is no showing that existing facilities would be adversely affected. Further, if the booster stations were granted and were subsequently shown to cause interference due to modification of existing full service FM stations or new allocations, Big Island would be required to suspend operation. This would be consistent with the secondary nature of boosters, which are not permitted to continue to operate where they cause interference to the direct reception by the public of the off-the-air signal of any authorized broadcast station.[4]

10. Turning to the specific proposals before us, Big Island first asserts that its original intent was to serve the entire island of Hawaii. Big Island supports its contention by stating that it applied for and was granted authorization for Class C facilities which, if centrally located, would have encompassed the island with a 1 mV/m signal and no waiver would have been necessary. However, the centrally located site was only hypothetical and because of island-wide site restrictions, Big Island was unable to meet the minimum antenna height requirements of the rules for Class C facilities. An authorization for Class C1 facilities was therefore issued. We conclude that the intent of a broadcaster to serve a wider area than it is ultimately licensed to serve furnishes no independent basis for waiver of our rules, especially where these rules are specifically intended to limit the broadcaster's ability to extend its signal beyond its authorized service area. We therefore reject this argument as a basis for granting Big Island's waiver requests.

11. Big Island also contends that waiver is necessary because the numerous and severe natural disasters that occur on the Island require that there be one station that can serve all inhabited areas. We do not agree that an unusual number of severe natural disasters requires a single station to cover the entire area. Our experience suggests that broadcasters consistently cooperate to provide disaster information to residents of affected areas. Since there are a number of broadcast stations serving most parts of the Island, we also reject Big Island's second contention as a basis for granting the waiver requests.

12. Finally, Big Island argues that its proposals will provide service to unserved areas. We find that the areas to be served by the Keauhou and Waikii boosters are already receiving service from at least one authorized broadcast facility. Most of the areas covered by these proposed boosters receive coverage from two or more facilities. Therefore, we see no need for Big Island to extend its signal into these particular areas, and reject Big Island's third contention as a basis for granting the Keauhou and Waikii boosters.

13. It is unrefuted, however, that the booster proposed for Puueo will provide a first service to over 1,300 people. Given that fact and the severity of the natural disasters that are known to occur in that area, we find sufficient justification to grant a waiver of the rules to allow Big Island to construct the booster station proposed for Puueo, Hawaii.[5] In granting this waiver we recognize that the booster station will be used in a manner inconsistent with its established purpose. As noted, booster stations may only be operated within a primary FM station's predicted service area. This helps assure that the booster station is not used by full service FM station permittees or licensees to extend the service contour of their full service stations. More recently we reiterated our concern in this regard. *See In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Boosters Stations and Television Booster Stations*, 2 FCC Rcd. 4625 (1987). We have consistently held that FM booster stations may only be used to fill in terrain-shadowed areas within the service contour of the primary station where the actual coverage of the primary station does not conform to its predicted coverage area. However, we are confronted in the case of the Puueo proposal with a unique combination of circumstances: recurring natural disasters, a small geographically isolated unserved area, no foreseeable prospects for receiving broadcast service from any other source, including a new stand-alone broadcast station, and the lack of any constraints on the introduction of other broadcast services in nearby areas. Given these facts, and the lack of viable alternatives, we will grant this waiver request.

14. Although in Sirius's view it would be more appropriate for Big Island to petition for Rule Making to add new channels for the unserved areas and then file applications for new FM stations, grant of the Puueo booster application will not preclude applications for new full service facilities in the same area. In this regard, applications for new full service FM stations or for modification of existing FM facilities are reviewed without consideration of existing booster facilities. As a secondary service, a booster station must give way to any conflicting full service proposal. Big Island has demonstrated that there is a current need for broadcast service in Puueo. The question before us is whether grant of Big Island's proposal for Puueo will serve the public interest and we have found this to be the case.

15. Accordingly, for the reasons stated herein, the informal objections filed by Sirius Communications, Inc. ARE GRANTED, to the extent indicated above and DENIED in all other respects; the request for waiver of Sections 74.1231(h), 74.1232(e), 74.1235(c) and 74.1237(d) of the Commission's Rules filed by Big Island Broadcasting Company, Ltd., to permit the above-referenced booster stations to operate outside the 1 mV/m contour of station KIPA-FM, IS GRANTED for application BPFTB-881114TD, Puueo, Hawaii and is DENIED for applications BPFTB-881114TC, Keauhou, Hawaii, and BPFTB-881114TE Waikii, Hawaii. The application for Puueo, Hawaii IS GRANTED and the applications for Keauhou, Hawaii and Waikii, Hawaii ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Big Island indicates that most of the population of the island resides near the coastal areas, with the center of the island being essentially uninhabited.

[2] None of the areas to be served receive more than four aural services at night.

[3] *Notice of Inquiry, In the Matter of Amendment of Part 74* of the Commission's Rules Concerning FM Translator Stations, 3 FCC Rcd. 3664 (1988); *Notice of Proposed Rulemaking, In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd. 2106 (1990); *Report and Order*, FCC 90-375, released December 4, 1990.

[4] Section 74.1203(a) of the Commission's Rules, 47 CFR 74.1203(a) (1990).

[5] The Island of Hawaii is covered by an existing Emergency Broadcast System (EBS) plan. Grant of the Puueo booster station will improve this plan by providing emergency information to a larger number of people.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY — File No. I-T-C-90-174

Application for authority to reassign circuits in the PTAT-1 Cable and to acquire connecting circuitry for service between the U.S. and Belgium, France, the Netherlands, Spain, Sweden and Switzerland.

ORDER AND AUTHORIZATION

Adopted: January 15, 1991; Released: January 24, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to reassign circuits in the Private Transatlantic Telecommunications Cable System (PTAT-1) and to acquire and operate connecting facilities for service between the U.S., on the one hand, and Belgium, France, the Netherlands, Spain, Sweden and Switzerland, on the other hand, and beyond. The application was placed on public notice on September 12, 1990. No comments were received.

2. AT&T is a common carrier engaged in the provision of interstate and foreign telecommunications services. AT&T currently provides service to all the points for which service is requested in the captioned application and seeks to supplement this service by use of PTAT-1 capacity. AT&T has been authorized to acquire and operate circuits in the PTAT-1 cable.[1] AT&T now seeks authority to reassign eight E-1 circuits[2] in the PTAT-1 cable, jointly held by AT&T and its correspondent in the United Kingdom, from service to the United Kingdom to service with Belgium, France, the Netherlands, Spain, Sweden and Switzerland. Since the Commission has previously considered AT&T's need for these circuits, we find that the reassignment of these circuits and the acquisition of necessary connecting circuits will serve the public interest.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-90-174 IS GRANTED, and AT&T is authorized to:

a. reassign a total of eight E-1 circuits in the PTAT-1 cable, jointly held by AT&T and its correspondent in the United Kingdom, from service to the United Kingdom to service with Belgium (one E-1), France (one E-1), the Netherlands (one E-1), Spain (two E-1), Sweden (one E-1), and Switzerland (two E-1);

b. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in one E-1 circuit in the UK-France No. 3 cable for service to France;

c. lease a one-half interest in two E-1 circuits in the UK-France No. 3 cable for service to Spain;

d. acquire, on an IRU basis, a one-half interest in one E-1 circuit in the UK-Denmark No. 4 cable for service to Sweden;

e. acquire, on an IRU basis, a one-half interest in three E-1 circuits in the UK-Netherlands No. 12 cable (two for service to Switzerland and one for service to Belgium);

f. lease and operate necessary connecting facilities; and

g. use said facilities to provide AT&T's regularly authorized services between the U.S., on the one hand, and Belgium, France, the Netherlands, Spain, Sweden and Switzerland, on the other hand, and beyond.

4. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See American Telephone and Telegraph Co.*, 4 FCC Rcd 7005 (1989) and 5 FCC Rcd 2593 (1990).

[2] An E-1 circuit is equivalent to a capacity of 2.048 Megabits per second (Mbps).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. — File No. I-T-C-91-013

Application for authority to acquire and operate facilities for service between the U.S. and Nicaragua and beyond.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 15, 1991; Released: January 24, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Nicaragua. The application was placed on public notice on October 18, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Nicaragua and beyond by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-013 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate four voice-grade satellite half-circuits between the Roaring Creek, Pennsylvania earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Nicaragua, furnished by TRTI's correspondent in Nicaragua;

b. lease and operate four voice-grade circuits in the Roaring Creek, Pennsylvania earth station;

c. lease and operate connecting facilities between the Roaring Creek, Pennsylvania earth station and TRTI's New York City operating office; and

d. use said facilities to provide TRTI's regularly authorized services, including switched voice service, between the U.S. and Nicaragua and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Nicaragua, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-605

In the Matter of

Revision of Parts 15 and 68 of the Commission's rules regarding cordless telephones — RM-6537

REPORT AND ORDER

Adopted: January 8, 1991; Released: January 25, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

INTRODUCTION

1. By this action, the Commission is amending Parts 15 and 68 of its rules to require cordless telephones to be equipped with security features that protect the public switched telephone network from unintentional line seizure and telephone dialing.[1] We are taking this action to reduce the harm being caused by some cordless telephones to the "911" Emergency Services Telephone System and to the telephone network in general.

BACKGROUND

2. A cordless telephone is a two-way low power communication system consisting of two parts: the "base" unit which connects to the telephone network and the handset or "remote" unit. The base unit and the handset are connected by a radio link that is designed to eliminate the connecting handset cord of a standard telephone, thus allowing the user to move a short distance from the base unit while carrying on a telephone conversation. The radio frequency components of cordless telephones operate under the provisions of Part 15 of the Commission's rules. The base unit must also meet the provisions of Part 68 of the Commission's rules.

3. The rules for cordless telephones were adopted by the Commission on December 22, 1983.[2] In the proceeding which led to the adoption of these rules, the issue of cordless telephone security was raised. [3] Although comments expressed concern that cordless telephones might initiate unintentional dialing and cause operational problems for telephone companies, the Commission chose to let the marketplace decide whether to provide security features that would avoid such problems. However, the Commission did propose, and subsequently adopt, a requirement to attach a label on cordless telephones to inform consumers of the security features incorporated.[4]

4. On September 1, 1988, the Personal Communications Section of the Telecommunications Industry Association (TIA) filed a petition requesting that the Commission consider rules requiring that cordless telephones provide increased protection to the telephone network from unintentional line seizure and dialing, and protection to the user from unintentional ringing. TIA recommended that this be achieved by requiring the transmission and use of a digital security code, or an equivalent method, so that a cordless telephone would not inadvertently respond to either electronic noise or another cordless telephone with a different security code. TIA expressed concern that, based on its studies, cordless telephones not equipped with security coding were causing significant interference to many telephone company services, to customers with low digit telephone numbers, and to the "911" Emergency Services Telephone System.[5]

5. Primarily in an attempt to reduce harm to the "911" Emergency Services Telephone System, the Commission, on December 11, 1989, adopted a *Notice of Proposed Rule Making (NPRM)* in this proceeding.[6] The *NPRM* proposed rules requiring that each access of the telephone network by a cordless telephone and each ringing of a cordless telephone handset be preceded by the transmission of a digital security code word. Access to the telephone network would be permitted only if the security code transmitted by the handset matched the security code set in the base unit. In addition, in order to prevent unintentional ringing of cordless telephones, ringing of the handset would be permitted only if the security code transmitted by the base unit matched the security code in the handset.

6. The Commission proposed, in the *NPRM*, that cordless telephones provide for at least 256 different security code combinations. To further reduce the likelihood of interference, the Commission proposed measures to make it unlikely that two cordless telephones with overlapping operating areas would use the identical security code. The Commission proposed to allow manufacturers to choose from among two plans to facilitate use of different security codes: (1) provide a means for the user to readily select from among at least 256 possible discrete digital codes; or, (2) provide a means for the cordless telephone to automatically select a code from among at least 256 possible discrete digital codes. The proposed rules would also permit cordless telephones to be provided with a combination of these methods. The Commission indicated that it intended to consider alternative plans, including allowing cordless telephones to incorporate a fixed digital code as long as the manufacturing process provided for varying the code. The Commission also invited comments regarding TIA's proposal that manufacturers be permitted to use an alternative security method that would provide protection equivalent to that offered by the proposed methods.

7. The Commission, in the *NPRM*, proposed that, within 60 days following the effective date of a final order in this proceeding, all cordless telephone applications submitted to the Commission for equipment authorization be required to demonstrate compliance with the proposed regulations. Further, within one year from the effective date, all cordless telephones manufactured or imported would be required to comply with the regulations.

8. Twenty-two parties submitted comments or reply comments in response to the *NPRM*. A list of those filing comments is contained in Appendix A.

DISCUSSION

9. The commenters were unanimous in supporting a requirement for cordless telephones to use digital security codes. Most of the commenters also supported the Commission's proposal as detailed in the *NPRM*; however, many commenters were divided on the precise requirements, such as the minimum number of code combinations, the desirable schemes for code implementation, how to adequately achieve variations in security codes, and the implementation dates.

10. From the evidence presented in this proceeding, it appears that interference to the public switched telephone network from cordless telephones, as well as the unintentional ringing of cordless telephones, is a growing problem. Furthermore, there appears to be evidence that the Emergency Services Telephone System is being adversely affected by unintentional dialing by cordless telephones. It also appears that security coding of cordless telephones, which could provide an effective solution to these problems, is not being implemented by manufacturers at a satisfactory rate on a voluntary basis. There is no indication that the percentage of cordless telephones being marketed with security coding is significantly increasing or that marketplace forces will eventually cause such features to become standard on cordless telephones.

11. Thus, it appears that regulation is needed to protect the public switched telephone network from unintentional line seizure and dialing by cordless telephones and to ensure that cordless telephones do not ring unintentionally when in the presence of signals from other cordless telephones or other interfering electrical or electromagnetic emissions. Based on the comments, digital security coding appears to offer a satisfactory means for achieving these objectives. Therefore, the Commission is adopting regulations requiring digital security coding requirements, as contained in Appendix B and outlined below.

12. *Minimum number of code combinations.* The commenters all agreed that a minimum of 256 possible code combinations should be sufficient to achieve the Commission's objectives in this proceeding. GTE and PhoneMate indicated, however, that an even greater number of code combinations would be desirable to provide a further improvement in cordless telephone security.[7]

13. A requirement for a minimum of 256 code combinations by itself ensures that the likelihood of an interaction between two cordless telephones is less than 0.4 percent. Other factors reduce the likelihood of interaction even further. For example, the coding technologies employed by different manufacturers are often incompatible (i.e., use different coding rates, algorithms or subcarrier frequencies) so that two cordless telephones from different manufacturers may not interact even if they appear to be set to the same code. Further, we fully expect that many cordless telephones will be offered with more than 256 combinations in response to demand from that segment of the market interested in greater security.[8] Also, while two cordless telephones may have overlapping service areas, they may be set to different channels since ten channels are available. In light of these factors, we agree with the commenters that a requirement for a minimum of 256 code combinations will provide reasonable protection against interference to the public switched telephone network from cordless telephones and the unintentional ringing of cordless telephones.

14. *Code implementation.* The *NPRM* proposed, *inter alia*, two specific schemes for implementing security coding: allowing the user to select a security code and allowing the cordless telephone itself to automatically select a security code each time it is activated. Based on the comments, both of these schemes appear to offer adequate security without imposing an unreasonable burden upon cordless phone manufacturers. Accordingly, the rules we are adopting will allow these schemes to be used.

15. The *NPRM* also sought comments on permitting fixed security codes. Most commenters supported allowing fixed security codes provided the manufacturer establishes an adequate system for varying the fixed code as cordless telephones are manufactured. GTE suggests that the codes should be changed on a continuous basis. TIA, on the other hand, argues that frequent code changes would be adequate. However, GTE points out that allowing frequent changes could still result in multiple cordless telephones with the same security code being sent to a single retail outlet. Because neighbors often shop in the same stores, GTE concludes that sequentially-manufactured units should be required to have different security codes. AT&T and Uniden suggest that the codes should be varied randomly, while GTE and Dynascan recommend the codes be varied sequentially. Tandy indicates that it is impractical to vary the fixed code during manufacturing, yet Southwestern Bell submits that some manufacturers are already doing so.

16. Comments from Southwestern Bell and AT&T indicate that the initial settings of user-selectable security codes should also be varied in order to achieve geographic separation. AT&T suggests that "a very large number of buyers will not change the code that is pre-set into their telephone."

17. The Commission continues to believe that there must be some means of assuring that cordless telephones, in the same geographic area, have different security codes. We have considered the various comments and have concluded that the only practical way to ensure that cordless telephones operating in the same geographic area are set to different security codes is to require manufacturers to continuously vary the security code of each telephone as it is manufactured. In order to provide manufacturers with the flexibility they seek, we are allowing security codes to be varied either randomly, sequentially, or by using any other systematic method. In addition, manufacturers of cordless telephones that utilize user-selectable security coding may either continuously vary the initial security code or provide cordless telephones that are incapable of transmitting until the user selects a security code.[9] We are also allowing combinations of fixed, automatic, and user-selectable coding provided the coding schemes are consistent with these policies. We believe that the flexibility we have provided by allowing several coding schemes should provide manufacturers with a number of reasonable alternatives for complying with these requirements.

18. *Alternative Security Methods.* The Commission, in the *NPRM*, sought comment on TIA's proposal to allow manufacturers to use alternative security methods for cordless telephones that would provide protection equivalent to that offered by the proposed digital coding methods.[10] It was the consensus of the commenters that alternative methods for providing security coding should be handled through the Commission's waiver process. We anticipate that alternative methods for providing security

coding will be devised that fully satisfy the objectives and fundamental policies described above. We do not intend to impede development of such new technology. We agree with the commenters, however, that such alternative methods are appropriately treated on a case-by-case basis by waivers. To expedite the waiver process, the Commission authorizes the Chief Engineer to grant waivers allowing other equivalent security coding methods.

19. *Clarifications.* Commenting parties expressed concern that the proposed rules were unclear as to how often the security code needs to be transmitted. Southwestern Bell, for example, questioned whether the Commission was suggesting that the digital security code should precede only the initial dialed digit or each dialed digit. Although the *NPRM* did refer to security codes "used in the dialing function", the *NPRM* also stated that "whenever the user initiates a call, the transmitter first sends its digital code and then follows with the dialing signals."[11] In the final rules, in the interest of clarity, we are eliminating the reference to dialing and are indicating that the security code must be transmitted in order to access the telephone network.

20. O'Neill Communications, Inc., in an *ex parte* presentation, stated that it is currently in the advanced stages of developing a fully digital wireless telephony system. O'Neill expressed concern that the proposed rules might require sophisticated communications systems, that already pass unique transmitter identification for billing and other purposes, to transmit an additional security code solely for telephone network access. Obviously, in such cases the transmission of additional security coding information is unnecessary and would be an inefficient use of communications. Therefore, we are specifically stating in the rules that the security code may also be used for other communications purposes.

21. *Repairs.* APCO, in its comments, proposes that the Commission require security coding be added to all noncompliant cordless telephones if they are refurbished or repaired. Most of the comments oppose APCO's proposal.[12] Southwestern Bell states that adding digital coding to an existing unit requires the addition of up to two integrated circuits and ten to twenty electronic components in both the handset and the base unit. Southwestern Bell further states that such reconditioned units would be less reliable, since the cordless telephones were not engineered to operate with the retrofitted circuits. Southwestern Bell states that for smaller models, the size of the handset case may prohibit the addition of the components necessary for reconditioning.

22. The Commission finds that the impact of requiring a retrofit, which in many instances would cost more than a new unit, is not supported by the record. Furthermore, because it is likely that only a small fraction of existing cordless telephones would be returned for repair, there is little benefit to be achieved from such a proposal. Therefore, the Commission is persuaded that a requirement to install security coding on cordless telephones being repaired or refurbished is not in the public interest.

23. *Low voltage detection.* In the *NPRM*, the Commission indicated that low voltage in a cordless telephone's battery supply can cause spurious pulsing, sometimes resulting in the cordless telephone dialing an unintentional call.[13] APCO states that the Commission should require manufacturers to design cordless telephones with a circuit capable of detecting low voltage and disabling operation of the unit before it makes false calls. US West supported APCO's proposal. Neither APCO nor US West submitted any data indicating that the problems associated with low battery voltage are either significant or would not be adequately addressed by our security coding requirements. The majority of the comments state that the problem being encountered by APCO results not from low voltage but from cordless telephones operating at the edge of their usable service area. Southwestern Bell states that, when digital security coding is properly implemented, access to the telephone network will occur only within the range of where the unit can function properly.

24. Based on the comments, the Commission does not believe that it should require cordless telephones to employ circuitry that will disable the connections to the telephone network when the handset battery voltage is low. We do not have sufficient evidence that such a requirement is justified. Further, the comments indicate that the security coding requirements we are adopting may be sufficient to alleviate many false dialing problems caused by cordless telephones with low battery voltage.

25. *Label requirements.* Some of the commenters point out that, when the new regulations go into effect, the label requirement of Section 15.233(k) would become redundant.[14] They requested that this requirement be removed because of the limited space available on a cordless telephone and its packaging. We agree that, since security coding will be mandatory on all cordless telephones, this label requirement serves no useful purpose. Therefore, we are removing this requirement for cordless telephones that are certificated to comply with the security coding requirements we are adopting herein.

26. *Other Matters.* Although not discussed in the *NPRM*, we are also taking this opportunity to consolidate, under the new Section 15.214, the general requirements for cordless telephones currently contained in Sections 15.233(h), (i), and (j). Prior to March 30, 1989, Section 15.235, a note following Section 15.235, and Section 15.236(a) of the former rules contained certain equipment authorization, label, and information requirements that were intended to apply to all cordless telephones regardless of operating frequency. In the *First Report and Order* in GEN Docket No. 87-389, these requirements were moved to Sections 15.233(h), (i), and (j). The title of Section 15.233, however, improperly suggests that these requirements apply only to cordless telephones operating on certain frequencies. Because Section 15.214 clearly applies to all cordless telephones regardless of operating frequency, it is more appropriate that the general cordless telephone requirements be contained therein. This change constitutes a minor amendment to our rules. It imposes no new requirement but, rather, eliminates possible confusion in the existing rules. Therefore, we find for good cause that, for this change, compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. 553(b)(B).

27. *Implementation dates.* In the *NPRM*, the Commission proposed that equipment applications filed 60 days following the effective date of the order must demonstrate compliance with the rules adopted herein. The Commission further proposed that within one year of the effective date, all cordless telephones manufactured or imported must comply with the rules adopted herein. DU-COMM argues that, because the Commission is aware of the problems that cordless telephones without security coding can cause, the Commission should immediately cease processing equipment authorization requests, and revoke existing

equipment authorization grants, for any cordless telephone that does not conform to the rules adopted in this proceeding. Such an action would prohibit the further manufacture of cordless telephones without security coding.

28. GTE suggests that, since the manufacturers themselves requested these coding rules, they are aware of its impact and are presumably prepared to implement it. Tandy, however, states that the mere fact that TIA submitted a petition for rule making does not constitute notice that the ruling requested by TIA will be adopted by the Commission. Tandy points out that in 1983 the Commission proposed telephone security requirements which the Commission subsequently declined to adopt.[15] Tandy believes that there is a substantial uncertainty as to whether the measures proposed by TIA will be adopted and that there is a substantial uncertainty as to the requirements which the rules will entail.

29. The Commission agrees with Tandy that there was some uncertainty about the exact rules that would be adopted by the Commission; however, the Commission also takes note of the fact that the marketplace has already had seven years to voluntarily implement security coding, which it has failed to do. Based on the comments, the Commission believes that, when it is estimated that 10 million cordless telephones will be sold in the next year and that about half of these telephones could cause harmful interference to the telephone network, swift action is necessary.[16] The Commission believes, based on the comments, that it is economically achievable for manufacturers and importers to comply with these requirements within six months. Therefore, the Commission will require that, within six months of the effective date, all cordless telephones manufactured in or imported into the U.S. employ security coding. In addition, applications for a grant of equipment authorization of cordless telephones without digital coding, as specified above, will not be accepted by the Commission 60 days after the effective date of these rules, as originally proposed. Cordless telephones that have already received equipment authorization and, without modification, already comply with the requirements of the rules that we are adopting herein, need not be reauthorized.

PROCEDURAL MATTERS

30. *Regulatory Flexibility Final Analysis*: Pursuant to the Regulatory Flexibility Act of 1980, 5 USC 601 *et seq.*, the following final flexibility analysis has been prepared:

I. Need for and objective of the rules.

Cordless telephones without digital coding appear to be causing significant interference to many telephone company services. In some cases, telephone line seizures have nearly closed down central offices and are causing significant unnecessary interference to many telephone company services, particularly to customers with low telephone numbers and to the "911" Emergency Services Telephone System. The objective of the rules being adopted is to reduce the amount of harm that is being caused by cordless telephones to the public switched telephone network and the "911" Emergency Services Telephone System.

II. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis, Commission assessment of such comments, and changes made as a result.

No commenting parties raised issues specifically in response to the initial regulatory flexibility analysis. The regulations being adopted in this *Report and Order* require cordless telephones to incorporate circuitry which makes use of a security code to provide protection against unintentional access to the public switched telephone network by the base unit of a cordless telephone and unintentional ringing by the handset of a cordless telephone. These functions will be required to operate such that each access of the telephone network or ringing of the handset is preceded by the transmission of a code word. Access to the telephone network will occur only if the code transmitted by the handset matches the code set in the base unit. Similarly, ringing of the handset is to occur only if the code transmitted by the base unit matches the code set in the handset. The proposed regulations are technically and economically achievable without undue burden on any entity. Manufacturers are being given substantial flexibility on how to implement security coding. Because these changes to the regulations will have an impact on a number of manufacturers, requiring redesign of their equipment, transition periods are being adopted. These transition periods will lessen the impact to manufacturers, allowing manufacturers sufficient time to implement any needed design changes before compliance with the regulations adopted by this *Report and Order* is required.

III. Significant alternatives considered.

The Commission has considered all of the alternatives presented in this proceeding and has adopted standards that can be achieved by industry while still providing adequate protection to the public switched telephone network. Alternatives that were considered include deleting all standards and restrictions on the marketing of noncomplying equipment, retaining the present regulations, adopting the regulations proposed in the *NPRM*, or adopting tighter standards than proposed.

31. The Office of Management and Budget has approved the collection of information requirement contained in this rule. The OMB control number for this collection of information requirement is 3060-0436.

ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 303(s), 304 and 307 of the Communications Act of 1934, as amended, Parts 15 and 68 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B below. These rules and regulations are effective **March 11, 1991.** IT IS ALSO ORDERED that authority is delegated to the Chief Engineer to grant waivers to manufacturers employing alternative security coding methods, provided there is basis for finding that the coding employed will provide at least the same level of protection as that provided in the rules adopted herein. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Formal Comments

1. Dynascan Corporation; Cobra Electronics Group
2. Associated Public-Safety Communications Officers, Inc. (APCO)
3. United States Telephone Association (USTA)
4. The Bell Atlantic Telephone Companies (Bell Atlantic)
5. GTE Service Corporation (GTE)
6. Ameritech Operating Companies (Ameritech)
7. BellSouth Corporation and its operating telephone companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company
8. Pacific Bell and Nevada Bell (The Pacific Companies)
9. Southwestern Bell Corporation
10. Contel Material Management Co.
11. Uniden America Corporation (Uniden)
12. DuPage Public Safety Communications (DU-COMM)
13. Central Telephone Company (CENTEL)
14. National Telephone Cooperative Association (NTCA)
15. O'Neill Communications, Inc.
16. Personal Communications Sections of the Telecommunications Industry Association (TIA)
17. State of California, Telecommunications Division
18. Tandy Corporation (Tandy)
19. PhoneMate, Inc.
20. American Telephone and Telegraph Company (AT&T)
21. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
22. U S West Communications

APPENDIX B

A. Title 47 of the Code of Federal Regulations, Part 15 is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sections 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.37, is amended by adding a new paragraph (e) to read as follows:

Section 15.37 Transition provisions for compliance with the rules.

* * * * *

(e) For cordless telephones: The manufacture and importation of cordless telephones not complying with Section 15.214(d) shall cease on or before (insert date six months after effective date). These provisions will not apply to cordless telephones which are repaired or refurbished, or re-imported after repair or refurbishment. Applications for a grant of equipment authorization of cordless telephones not complying with Section 15.214(d) will not be accepted by the Commission after (insert date 60 days after effective date). Cordless telephones that have previously received equipment authorization and that, without modification, already comply with the requirements of Section 15.214(d), need not be reauthorized.

3. A new Section 15.214 is added, prior to the heading "Radiated Emission Limits, Additional Provisions", to read as follows:

Section 15.214 Cordless telephones.

(a) For equipment authorization, a single application form, FCC Form 731, may be filed for a cordless telephone system, provided the application clearly identifies and provides data for all parts of the system to show compliance with the applicable technical requirements. When a single application form is submitted, both the base station and the portable handset must carry the same FCC identifier. The application shall include a fee for certification of each type of transmitter and notification or certification, if appropriate, for each type of receiver included in the system.

(b) A cordless telephone which is intended to be connected to the public switched telephone network shall also comply with the applicable regulations in Part 68 of this Chapter. A separate application for registration under Part 68 is required.

(c) The label required under Subpart A shall also contain the following statement: "Privacy of communications may not be ensured when using this phone."

(d) Cordless telephones shall incorporate circuitry which makes use of a digital security code to provide protection against unintentional access to the public switched telephone network by the base unit and unintentional ringing by the handset. These functions shall operate such that each access of the telephone network or ringing of the handset is preceded by the transmission of a code word. Access to the telephone network shall occur only if the code transmitted by the handset matches the code set in the base unit. Similarly, ringing of the handset shall occur only if the code transmitted by the base unit matches the code set in the handset. The security code required by this Section may also be employed to perform other communications functions, such as providing telephone billing information. This security code system is to operate in accordance with the following provisions.

(1) There must be provision for at least 256 possible discrete digital codes. Factory-set codes must be continuously varied over at least 256 possible codes as

each telephone is manufactured. The codes may be varied either randomly, sequentially, or using another systematic procedure.

(2) Manufacturers must use one of the following approaches for facilitating variation in the geographic distribution of individual security codes:

(i) Provide a means for the user to readily select from among at least 256 possible discrete digital codes. The cordless telephone shall be either in a non-operable mode after manufacture until the user selects a security code or the manufacturer must continuously vary the initial security code as each telephone is produced.

(ii) Provide a fixed code that is continuously varied among at least 256 discrete digital codes as each telephone is manufactured.

(iii) Provide a means for the cordless telephone to automatically select a different code from among at least 256 possible discrete digital codes each time it is activated.

(iv) It is permissible to provide combinations of fixed, automatic, and user-selectable coding provided the above criteria are met.

(3) A statement of the means and procedures used to achieve the required protection shall be provided in any application for equipment authorization of a cordless telephone.

4. Section 15.233 is amended by removing paragraphs (h), (i), (j), and (k), and adding new paragraph (h) to read as follows:

Section 15.233 Operation within the bands 46.60 - 46.98 MHz and 49.66 - 50.0 MHz.

* * * * *

(h) For cordless telephones that do not comply with Section 15.214(d), the box or other package in which the individual cordless telephone is to be marketed shall carry a statement in a prominent location, visible to the buyer before purchase, which reads as follows:

NOTICE: The base units of some cordless telephones may respond to other nearby units or to radio noise resulting in telephone calls being dialed through this unit without your knowledge and possibly calls being misbilled. In order to protect against such occurrences, this cordless telephone is provided with the following features: (to be completed by the responsible party).

An application for certification of a cordless telephone shall specify the complete text of the statement that will be carried on the package and indicate where, specifically, it will be located on the carton.

B. Title 47 of the Code of Federal Regulations, Part 68 is amended as follows:

1. The authority citation for Part 68 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 313, 314, 403, 404, 410, 602, 48 Stat. as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102; 47 U.S.C. 154, 201, 202, 203, 204, 205, 208, 215, 218, 313, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.200 is amended by adding a new paragraph (k), to read as follows:

Section 68.200 Application for equipment registration.

* * * * *

(k) Any application for registration of a cordless telephone operating under the provisions of Part 15 of this Chapter shall be accompanied by a statement indicating that the device contains appropriate provision for protection of the public switched telephone network, pursuant to the requirements in Section 15.214.

FOOTNOTES

[1] Security provisions referred to in this proceeding are cordless telephone features that prevent unauthorized access to the telephone line, the dialing of calls in response to signals other than those from the owner's handset and the unintentional ringing of a cordless telephone's handset. These terms do not refer to the ability of someone else to listen in on a conversation.

[2] *See Report and Order* in GEN Docket No. 83-325, 49 FR 1512 (adopted December 22, 1983).

[3] *See id.* at para. 20-27.

[4] *See Second Report and Order* in GEN Docket No. 83-325, 50 FR 24513 (adopted May 20, 1985).

[5] TIA indicated that these problems typically occur when such telephones respond to random radio noise bursts and signals from other cordless telephones on the same channel and, in turn, generate random hook switch closures that are interpreted by the telephone network as dialing sequences.

[6] *See Notice of Proposed Rule Making* in GEN Docket No. 89-605, 4 FCC Rcd. 8808.

[7] If all cordless were set to a single code combination, the telephone network would be protected from false dialing and line seizures from random noise bursts; however, it would not eliminate problems caused by cordless telephones placing calls through a neighbor's base unit. By requiring a minimum of 256 code combinations, these problems should also be avoided.

[8] According to AT&T's comments, all cordless telephones offered by AT&T have, for some time, incorporated a digital security coding feature. The AT&T 5500 provides 65,000 possible code combinations and operates on all ten available channels, thereby offering 650,000 possible code and channel combinations. It sells for under $150.

[9] We note that, in some existing cordless telephones, the security code is pre-set at a value for which no security coding is provided. The new rules would prohibit cordless telephones from being capable of operating under these conditions.

[10] *See Notice of Proposed Rule Making* in GEN Docket No. 89-605, *supra*. at para. 17.

[11] *See id.*, n. 6.

[12] The Pacific Companies requested that the Commission initiate a study to determine if the proposed rules should be extended to deal with existing cordless telephones that lack security provisions. NYNEX joined in this request.

[13] *See NPRM*, footnote 8, *supra*.

[14] The required statement reads as follows: "NOTICE: The base units of some cordless telephones may respond to other nearby units or to radio noise resulting in telephone calls being dialed through this unit without your knowledge and possible calls being misbilled. In order to protect against such occurrences, this cordless telephone is provided with the following features: (to be completed by the responsible party)." Prior to the *First Report and Order* in GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989), this label requirement was in Section 15.236(b).

[15] *See Notice of Proposed Rulemaking*, GEN. Docket No. 83-325, 48 FR 16,298, April 15, 1983.

[16] Ameritech states that approximately 29 million cordless telephones have been imported into this country in the last three years and that about 60% have no form of security coding.

Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Revision of Parts 15 and 68 of the Commission's Rules Regarding Cordless Telephones (Gen. Docket No. 89-605).

Roughly seven years ago --- in an act of stunning, even dangerous, naivete --- the Commission declined to adopt cordless telephone security rules. Instead of imposing such rules, the Commission dealt with the "potential problem of inadequate cordless telephone security" by merely hoping "that the marketplace would provide appropriate features . . . ". Amendment of Part 15 to Add New Interim Provisions for Cordless Telephones, FCC 83-597, at paragraph 27.

In the intervening years, cordless telephones lacking security features have been responsible for interference with telephone company operations. They have, as predicted seven years ago, inconvenienced many telephone users. In some cases, they have even interfered with "911" emergency services --- services upon which human life and safety often critically depend.

I am pleased, then, that the Commission has finally concluded that the public interest does, after all, require rules to preserve the integrity of the public switched telephone network.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-626

In the Matter of

Amendment of Part 15 of the
Commission's Rules to Permit
Cordless Telephone Operation
on Offset Frequencies

REPORT AND ORDER

Adopted: January 8, 1991; Released: January 25, 1991

By the Commission:

1. By this action, the Commission amends Part 15 of the Rules to permit cordless telephone manufacturers to position channels at other than the center of the ten frequency pairs set forth in Section 15.233 of the Rules, provided emissions remain within the specified bandwidth limitation.

BACKGROUND

2. On December 22, 1983, the Commission allocated ten duplex channels in the 46 and 49 MHz bands for the operation of cordless telephones pursuant to Part 15 of the rules. Under the rules originally adopted, transmissions from cordless telephones must fall on one or more of the ten authorized duplex channels, must be centered on the channel, and must be within a specific bandwidth. This allocation, which is in spectrum allocated to the Federal Government, was intended to be temporary.[1]

3. Subsequently, the Electronic Industries Association (EIA) filed a petition for rule making seeking a permanent allocation for cordless telephones in the 800/900 MHz band. Finding that an allocation in that portion of the spectrum for cordless telephones was not justified, the Commission denied EIA's proposal on November 19, 1987.[2] Instead, with the cooperation of the Executive Branch of the Federal Government, the Commission amended Part 15 of its Rules to allow cordless telephones to use the 46/49 MHz band indefinitely. [3] The Commission also concluded that users should be permitted to position channels at other than the center of the ten frequencies set forth in the rules, provided emissions remained within the specified bandwidth.[4] As a result of this decision, cordless telephones could, for example, incorporate a design that split the current twenty kilohertz bandwidth into two ten kilohertz channels. This new provision became known as the offset channel rule.

4. EIA petitioned the Commission for partial reconsideration of the latter *Order* to the extent that it permitted cordless telephone operation on offset channels. EIA predicted increased interference between cordless telephone users if the offset channel rule were adopted. EIA further contended that modifying the rules to allow cordless telephones to operate on offset channels required a rule making proceeding. On December 20, 1989, the Commission granted the EIA petition for reconsideration in a *Memorandum Opinion and Order* (*MO & O*) staying the rule change that permitted the use of offset channels.[5] Subsequently, the Commission issued a *Notice of Proposed Rule Making* (*NPRM*), proposing to allow cordless telephone operation on offset channels.[6] The *NPRM* also sought comments on a proposal made by ASCII of America (ASCII) suggesting that the spread spectrum technique of frequency hopping be permitted during the transmission of voice communications.

DISCUSSION AND DECISION

Offset Channels

5. *Comments*. Although most parties agree that additional channels are needed for cordless telephones, they believe that the channel offset proposal would result in an unacceptably high level of interference.[7] Commenters point out that about half the current cordless telephones being used have a "guard" or "pilot tone" offset 4 to 7 kHz from the carrier frequency for "hook switch" operations.[8] Commenters argue that a 5 kHz channel offset could overlap the "guard tone" and substantially increase the likelihood of interference to "hook switch" operations because of false "guard tone" signals that might be transmitted. Uniden observes that such interference would have several adverse consequences for central office operations. This result, according to Uniden, would be inconsistent with the Commission's ongoing effort to eliminate such interference by establishing digital security coding standards for "hook switch" operations[9] and might also result in greater interference to voice communications. AT&T and TIA state that false dialing of 911 emergency numbers and "busying-out" of entire central offices have already occurred in some cases because of interference to "guard tone" operations and believe this phenomenon will occur more frequently if channel offsets are permitted. Additionally, AT&T and Uniden observe that because some of the cordless telephone channels are separated by only 15 kHz, using offsets on these channels would have even a greater likelihood of causing adjacent channel interference. They point out that positioning the "guard tone" signal, used to contact the central office regarding the engaged status of the device, too close to the fringe of the adjacent channel, would increase the the likelihood of false 911 calls and tie ups of the central office equipment. AT&T points out that both the cordless telephone user and his neighbors could experience the interference. In reply, some commenters propose that the Commission delay the effect of the proposed offset channel rule until the concept can be further analyzed.

6. *Decision*. We do not anticipate any substantial increase in interference from cordless telephones operating on offset channels. Contrary to Uniden's contentions, we do not consider it very likely that offset channels will increase co-channel and adjacent channel interference to voice communications. Interference between devices is most prevalent when both devices are centered on the same frequency. As the center frequency of each device is moved away from the other, interference is generally reduced. Offset channels will result in fewer cordless tele-

phones being centered precisely on the same frequency and, therefore, should reduce interference to voice communications.

7. Only half the cordless telephones on the market use a "guard tone" design. Further, many of the "guard tone" cordless telephones employ two guard tones in an effort to avoid interference.[10] We do not expect these telephones to suffer any interference from cordless telephones operating on offset channels. As for the remainder of the "guard tone" cordless telephones, interference from an offset channel operation should be no more of an interference problem than that currently experienced from cordless telephones operating on the center frequency because the permitted frequency tolerance for cordless telephones can easily vary more than 5 kHz.[11] We recently addressed the problem of false dialing in GEN Docket No. 89-605, wherein we proposed requiring digital security coding for "hook switch" operations. In a separate item today,[12] we are adopting the rules associated with that proposal. We are requiring that all cordless telephones manufactured in or imported into the United States on or after 6 months from effective date of GEN Docket No. 89-605 incorporate digital encoding. We expect that it will take several years before manufacturers can design, develop, and substantially market new cordless telephones that use offset channels. Whatever little interference that might have been experienced by central offices or 911 operations, permitting the use of offset channels can be minimized by requiring that the introduction of offset channel equipment coincide with the effective date of the new digital security coding requirement. Further, we find that, the offset channel option should increase the spectrum efficiency that will be achieved. We also believe that "hook switch" type interference will not be intensified by offset channel operation.

Miscellaneous Matters

8. Commenters contend that the ASCII proposal allowing frequency hopping could significantly increase the risk of interference to other cordless telephones. According to Southwestern Bell, frequency hopping is not a viable technique for cordless telephones, which operate over only ten channels. In addition, AT&T asserts that intermittent transmissions falling at a "guard tone" frequency would have a greater potential for causing interference than a steady state carrier.

9. We agree that frequency hopping would not be effective for cordless telephone communications in the 46/49 MHz band. Because the likelihood of interference occurring from such operations could be significant, we will not adopt ASCII's proposal.

10. Uniden and TIA took the opportunity to recommend several non-related rule changes. They suggest that Section 15.233(a) be amended to permit an intentional radiator that is used as part of a cordless telephone system to operate on one or more frequency pairs. By this request, TIA intended to clarify the issue of whether a cordless telephone may scan the assigned channels for the purpose of finding a channel with the least interference.[13] We agree that an automatic channel selection feature, might be useful to enable a cordless telephone to select the channel with the least interference. A rule change is not necessary. This method is available and this practice is already permitted. Also, Uniden proposes that cordless telephones be relieved of the obligation of complying with the radiated emission limits of Section 15.209 of the Commission's Rules. Uniden's proposal is beyond the scope of this proceeding. Although Uniden is free to renew its request in a separate rule making petition, our initial view is that reducing the requirements for unwanted emissions would result in an unacceptable potential to cause harmful interference to authorized radio services.

11. Accordingly, under the authority contained in Sections 4(i), 301, 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that Part 15 of the Commission's Rules and Regulations ARE AMENDED as set forth in the Appendix. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED. The rules adopted in this proceeding will be effective **September 11, 1991.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Section 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, 304, and 307.

2. In Section 15.233, paragraphs (b) and (d) are revised, paragraph (e) is republished to read as follows:

Section 15.233 Operation Within the Bands 46.60-46.98 MHz and 49.66-50.0 MHz.

* * * * * *

(b) An intentional radiator used as part of a cordless telephone system shall operate on one or more of the following frequency pairs:

CHANNEL	BASE TRANSMITTER (MHz)	HANDSET TRANSMITTER (MHz)
1	46.610	49.670
2	46.630	49.845
3	46.670	49.860
4	46.710	49.770
5	46.730	49.875
6	46.770	49.830
7	46.830	49.890
8	46.870	49.930
9	46.930	49.990
10	46.970	49.970

* * * * * *

(d) The fundamental emission shall be confined within a 20 kHz band centered on the actual carrier frequency listed in paragraph (b), as adjusted by the frequency tolerance of the transmitter at the time testing is performed. Modulation products outside of this 20 kHz band shall be

attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. Emissions on any frequency more than 10 kHz removed from this 20 kHz band shall consist solely of unwanted emissions and shall not exceed the general radiated emission limits in Section 15.209. Tests to determine compliance with this requirement shall be performed using an appropriate input signal as prescribed in Section 2.989 of this Chapter.

(e) All emissions exceeding 20 microvolts/meter at 3 meters are to be reported in the application for certification.

* * * * *

FOOTNOTES

[1] *See Report and Order*, GEN Docket No. 83-325, 49 FR 1512 (January 1, 1984), 55 RR 2d 279 (1984). *See* 47 CFR Section 15.233 (1989), Operation within bands 46.60-46.98 MHz and 49.66-50 MHz.

[2] *See Order*, RM-4780, 2 FCC Rcd 7278 (1987).

[3] *See Order*, RM-4780, 2 FCC Rcd 7278 (1987).

[4] *See Order*, RM-5320, 2 FCC Rcd 7276 (1987).

[5] *See Memorandum Opinion and Order*, 5 FCC Rcd 307 (1989).

[6] *See Notice of Proposed Rule Making*, 5 FCC Rcd 309, adopted December 20, 1989 and released January 17, 1990.

[7] Five parties filed comments in this proceeding including: American Telephone and Telegraph Company (AT&T); Dynascan Corporation, Cobra Electronics Group (Dynascan); Southwestern Bell Corporation (Southwestern Bell); Telecommunications Industry Association (TIA), Personal Communications Section (TIA is a subgroup of the Electronics Industry Association); and Uniden America Corporation (Uniden). Reply comments were filed by AT&T, TIA, GTE Service Corporation, and United States Telephone Association

[8] The guard tone signals the base unit's "hook switch" that the telephone is engaged so that the base unit can activate a "hook relay" in order to communicate that fact to the telephone company's central office. AT&T and Dynascan claim that up to 15 million cordless telephones use the guard tone technology today. According to commenters, another 15 million cordless telephones in use today employ a digital coding technology for "hook switch" operations.

[9] *See Notice of Proposed Rule Making*, GEN Docket No. 89-605, 4 FCC Rcd 8808, (1989).

[10] Both guard tones must be detected in these devices before the hook relay is engaged. Thus, the probability of false dialing in these devices is most unlikely.

[11] A +/− 5 kHz frequency stability tolerance can already produce this degree of channel overlap; i.e., if one transmitter is 5 kHz low and the other 5 kHz high in frequency, the overlap would amount to as much as a 10 kHz offset.

[12] *See Report and Order*, Gen Docket No. 89-605, adopted XXX.

[13] On September 25, 1990 the FCC staff contacted Mr. Eric J. Schimmel, Vice President, Telecommunications Industry Association, to verify the intent of his comments filed in this proceeding on March 8, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-372

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS).	RM-5712

FIRST REPORT AND ORDER

Adopted: January 10, 1991; Released: January 25, 1991

By the Commission:

I. INTRODUCTION

1. By *Notice of Proposed Rule Making*, 3 FCC Rcd 4736 (1988) (*NPRM*) we proposed to amend our Rules to permit Automated Maritime Telecommunications Systems (AMTS) operations in the 216-220 MHz band on a nationwide basis and to relax mileage restrictions on coast stations operating on frequencies below 217.000 MHz in the vicinity of a TV channel 13 station.[1]

2. In this *First Report and Order* we are amending the rules to permit AMTS operations on a nationwide basis. Our consideration of issues pertaining to restrictions on coast stations use of frequencies below 217.000 MHz in the vicinity of a TV channel 13 station will be addressed in a Second Report and Order. We will address these issues after consideration of the TV Answer, Inc. (TV Answer) petition for rule making (RM-6196) seeking a portion of the 216-222 MHz band for a new interactive video and data service.

II. BACKGROUND

3. As a result of a U.S. proposal, the 1979 World Administrative Radio Conference (WARC) allocated the 216-220 MHz band to the maritime mobile service in Region 2, which includes the Americas and Greenland. The Commission allocated this band for use on the Mississippi River System by AMTS. *Inland Waterways Communications System*, 84 FCC 2d 875, *recon.*, 88 FCC 2d 678 (1981), *aff'd sub nom. WJG Tel. Co., Inc. v. F. C. C.*, 675 F.2d 386 (D.C. Cir. 1982). Subsequently the Commission expanded the authorized service area of the AMTS to the Gulf Intracoastal Waterway (GIWW), 51 RR 2d 440 (1982), and the Gulf of Mexico, 56 RR 2d 1613 (1984). The AMTS provides automated, integrated, interconnected ship-to-shore communications. The AMTS is similar to a cellular phone system, which includes non-voice services, for tugs, barges, and other vessels to use as they move along a waterway. It offers improved services over those available from individual public coast stations.

4. In establishing the AMTS, the Commission considered the potential for interference to television reception, particularly channels 13 and 10, and conditioned the operation of AMTS coast stations on the requirement that "no harmful interference will be caused to television reception." *See* Section 80.215(h), 47 C.F.R. § 80.215(h). Channel 13 (210-216 MHz) is adjacent to the AMTS band and thus there is a potential for adjacent channel interference. Channel 10 (192-198 MHz) is one-half the TV intermediate frequency (IF) below the AMTS band so there is also a potential for "half-IF interference."[2]

5. As a result, the AMTS rules include specific provisions to minimize the possibility of interference to television reception. There are 80 channels in the AMTS, divided into four groups of 20 -- Groups A, B, C and D. *See* Section 80.385, 47 C.F.R. § 80.385. Applicants proposing to locate a coast station within 169 kilometers (105 miles) of a TV channel 13 station or within 129 kilometers (80 miles) of a TV channel 10 station must submit an engineering study showing the means of avoiding interference within the Grade B contour of the TV station. *See* Sections 80.475(b)(1) and 80.215(h)(2)-(4), 47 C.F.R. §§ 80.475(b)(1) and 80.215(h)(2)-(4). Additionally, Group C and D channels cannot be used for coast stations within 105 miles of a TV channel 13 station, as they are closer in frequency to TV channel 13 than are the Group A and B channels. *See* Sections 80.215(h)(5) and 80.385(a)(2). Finally, if despite these precautions interference to TV reception is caused, Section 80.215(h)(4) requires the licensee to eliminate any interference caused within the Grade B contour of the TV station within 90 days of being notified of the interference by the Commission. If the interference is not eliminated within the 90 day period, operation of the offending coast station must be discontinued. That rule also encourages the licensee to help resolve all complaints of interference outside the Grade B contour.

6. The Commission conducted a study to analyze the interference potential from AMTS systems to TV reception. R. Eckert, *Guidance for Evaluating the Potential for Interference to TV from Stations of the Inland Waterways Communications Systems*, FCC/OST TM 82-5 (July 1982)(*Guidance*). This report is a model for applicants to use in performing any required engineering analysis of potential interference from AMTS systems to TV reception. The analysis was based on very conservative interference protection criteria. For example, the TV picture quality used for the analysis was "just perceptible" interference.

7. There is presently only one AMTS system, licensed to Watercom, serving the Mississippi River System and the GIWW. Watercom was initially granted authority to construct and operate an AMTS on the Group A channels in 1982, and its authorization was modified to include the Group B channels in 1984. Watercom built its system and put it on the air in segments in 1986 and 1987. During the time it has been operating there have been no complaints of interference to television reception.

8. We issued the *NPRM* in this proceeding in response to a petition for rule making filed by Watercom, requesting that AMTS be extended nationwide and that the prohibition on operating within 105 miles of a TV channel 13 on Group C and D channels be eliminated or modified.[3]

III. DISCUSSION

9. The *NPRM* proposed to permit nationwide (*i.e.*, throughout the 50 states) expansion of AMTS and the use of Group C and D channels subject to the same restrictions against interference to TV reception that apply to Group A and B channels. Additionally, we proposed to delete the requirement of Section 80.475(b) that an AMTS system cover 60 percent of a waterway (or its entirety if less than 150 miles (240 kilometers)) to permit greater flexibility in design. We requested comment, however, on whether there was a need for some requirement to encourage interoperability over a substantial portion of a waterway or coastline. Finally, we proposed blanket licensing of an AMTS system without licensing the individual mobiles.

10. The commenters included TV interests, Watercom and Maritel. Watercom and Maritel supported nationwide expansion and full use of Group C and D channels, and the broadcasters opposed both because of concerns about interference to TV reception. Further, in its comments TV Answer opposes the proposed rule changes to the extent that such changes would preclude the grant of its petition for rule making (RM-6196) which seeks a portion of the 216-222 MHz band for a new interactive video and data service. Specifically, TV Answer requested that the AMTS Group D channels assigned for ship stations be reallocated for interactive video and data service. We conclude that nationwide expansion of the A and B channels should proceed and the issue of the C and D channels should be addressed after full consideration of TV Answer's petition.

11. Because these proposed rule changes pertaining to interference and expansion are inseparable we will discuss them first. We then will address the other proposals pertaining to the 60 percent coverage requirement and blanket licensing.

A. Need for Nationwide Expansion

12. In large part the comments of TV interests argue that there has not been a sufficient showing of need for geographic expansion of AMTS operations in view of the potential for interference they perceive could occur if nationwide expansion is permitted. These comments reiterate concerns they had brought to our attention in previous proceedings involving AMTS. That is, they are concerned about the possibility of interference to TV reception and suggest the proposal lowers the level of interference protection for TV reception. *See, e.g.*, Association of Maximum Service Telecasters (AMST) Comments, *passim*. As discussed below, this is not the case. They make arguments, based on the *Guidance* memo, which the Commission considered and found unpersuasive in the *NPRM* and previous decisions involving AMTS. They also argue that Watercom's experience with a "ribbon" system along a river may not be comparable in interference potential to use of AMTS in a harbor, bay or lake. WRLH, Inc., Comments, Att. at 6. These commenters also assert that the threat of potential interference to TV reception is now even greater because the consumer can turn to interference free video services such as cable and video tapes in lieu of over-the-air TV, so over-the-air TV needs even more stringent protection. WLOX Comments at 4; AMST Comments at 7.

13. We discussed the question of television reception interference in the *NPRM* and tentatively concluded that the proposed expansion of AMTS would not cause interference problems to TV channels 13 and 10.[4] The comments submitted do not persuade us to reach a different conclusion. We emphasize again that we are not proposing to permit increased interference. We would require the same level of interference protection to TV reception for any future use. This means that, in addition to the requirement that "no harmful interference will be caused to television reception," the technical standards and interference analysis requirements of Sections 80.215(h)(1)-(4) and (6) and 80.475(b)(1) and (2) will apply. That is, applicants must design their systems in accordance with the requirements to avoid interference and must notify TV stations that may be affected of their applications. We are also amending Section 80.215(h)(3), which requires the applicant's plan to limit its interference contour to fewer than 100 residences or to take measures described in Section 80.215(h)(3)(i)-(iii), to make clear that, where more than one of the applicant's coast stations affects reception of a given TV station, we will count the total number of residences affected. Finally, if these requirements prove to be insufficient, and interference does occur, Section 80.215(h)(6) requires the licensee to eliminate it or cease operation. Thus, a fundamental premise of our AMTS rules is that no harmful interference be caused to television reception. If such interference does occur, the AMTS coast station must eliminate any interference to TV reception it causes within the Grade B contour or discontinue operation.

14. We emphasize also that no one has brought to our attention any indication that interference has occurred from Watercom's operations, including WLOX, whose channel 13 station at Biloxi, Mississippi, is bracketed by Watercom coast stations at Mobile and Bay St. Louis. Watercom, Reply Comments at 5. Similarly the comments of WRLH, Inc., licensee of WEAU-TV, channel 13, Eau Claire, Wisconsin, which is positioned near three AMTS coast stations, did not mention any actual interference problem that it had experienced. Maritel, Reply Comments at 6. Watercom has stated that its AMTS coast stations transmit continuously. Watercom, Reply Comments at 3. Because of the concerns they have articulated in their comments, we are confident that channel 13 stations such as WEAU-TV and WLOX-TV, which are located in an area of Watercom's AMTS operations, have been carefully monitoring the situation and would have detected interference if any had occurred.

15. During its nearly four years of operation Watercom received only one complaint alleging that it was causing interference. Watercom investigated this complaint from WOWK-TV, Huntington, West Virginia, and determined that the problem was unrelated to Watercom's operation but was caused by faulty TV antenna preamplifiers used by residents in the remote community where the complaint originated. WOWK-TV acknowledged Watercom's cooperation and noted that Watercom's engineer convinced the owners of the faulty equipment to remove it, resulting in much improved reception to the entire community. Letter from Martin W. Bercovici to Ralph Haller (June 16, 1989); letters from Al Grossniklaus, Chief Engineer, WOWK-TV to Chief, Private Radio Bureau (June 7 and 13, 1989).

16. Broadcasters state that an absence of complaints of interference does not mean that there is no interference. They say that viewers are not likely to complain and that they do not know where to complain. *See, e.g.*, WRLH, Inc., Comments, Att. at 2.[5] AMST cites *Digital Organs*, 56

RR 2d 840, 842 (1984) for the proposition that lack of complaints does not establish lack of interference. It would not, however, be necessary for a viewer to know that AMTS might be a source of interference and complain to the operator. The viewer who perceived interference on channel 13 and desired to complain could complain to the channel 13 station, which would of course be aware of AMTS. As to the concern that viewers might tolerate a great deal of interference without complaining, or deal with the interference by changing to another channel, we must assume that channel 13 stations would carefully monitor reception of channel 13 for any sign of interference which could be attributed to AMTS. Finally, the fact that interference from some sources is hard to trace, as pointed out in *Digital Organs, supra*,[6] is not relevant here; the AMTS coast stations are in fixed locations, operate continually, and are well known to channel 13 stations in their areas.

17. Experience with other private radio services operating in spectrum adjacent to TV is relevant here. Specifically, we note that private land mobile stations have operated in spectrum adjacent to TV channels 14 and 69 for years without any adverse effects to TV reception. In fact, experience has shown that it is more likely that land mobile stations will receive interference from TV stations than cause it. In this regard, in a recent proceeding examining the issue of land mobile operating in spectrum adjacent to a TV allocation, we stated,

> We have also considered the degree to which television stations should be protected from interference caused by subsequently authorized land mobile operations. While we could impose technical criteria or limitations on land mobile operations to provide such protection, land mobile to television interference, in our view, given current [TV] transmission standards, does not appear to be a significant problem or at least a problem of a sufficient magnitude to warrant government regulation. We note that, in recent years, in excess of thirty television stations on channel 14, and three on channel 69, have been successfully operating in communities with adjacent-channel land mobile operations. Based on that experience, we predict that the new television stations operating on those UHF channels should continue to be able to provide a quality signal to their viewing audience notwithstanding the presence of additional adjacent-band land mobile operations in their area. *Resolution of Interference between UHF channels 14 and 69 and Adjacent-channel Land Mobile Operations*, 2 FCC Rcd 7328, 7331 (1987).

18. Broadcasters also argue that future Advanced Television (ATV) will be particularly sensitive to interference. AMST Comments at 16. Since ATV is to be accommodated within spectrum allocated to the broadcasting service, not maritime mobile service, this should not be a concern. As discussed in paragraph 13 above, the rules provide that no harmful interference be caused to television reception by AMTS. *See Advanced Television Systems*, 3 FCC Rcd 6520, 6521, 6530 (1988).

19. Although we are not deciding the expansion of the Group C and D channels at this time, we note that broadcasters argue that there will be greater risk of interference from operation on the Group C and D channels. Judging from these and other comments, it appears many broadcasters misconstrued the *NPRM*. The *NPRM* proposed to allow operation on the Group C and D channels at distances closer than 105 miles to TV channel 13 stations provided an engineering analysis shows no greater risk of interference than if the Group A and B channel were used. The *Guidance* memo, which is used to determine if there is interference, takes into account the poorer interference rejection characteristics of TV receivers to interfering signals on frequencies closer to TV channel 13 such as the Group C and D channels. In other words, the necessary additional interference protection for the Group C and D channels must be taken into account in performing the required engineering analysis of interference. Thus we reject the argument that the proposed rule amendments will create an increased risk of interference to TV reception. Given the provisions of the rules, we conclude that TV reception interference concerns have been thoroughly considered and resolved. We are, however, holding the Group C and D frequencies in abeyence, as discussed above, until such time as the TV Answer Notice of Proposed Rule Making is concluded.

20. Finally, the United States sought and obtained an allocation of 216-220 MHz for the maritime mobile service in Region 2 at the 1979 WARC. When we initiated the AMTS service we restricted it to the Mississippi and adjacent waterways because of extreme caution regarding potential interference to TV reception. We are satisfied that we have sufficient experience to move forward now with expansion of this service. Watercom indicates that it desires to expand. Watercom Comments at 3-4. This will bring modern communication services to the maritime user community outside of the inland waterways network. Enhancements such as direct-dial telephony service to vessels for voice, data and facsimilie communications as well as vessel tracking and locations will be available to more of the maritime community.

21. In sum, we are not persuaded by the broadcasters' arguments that nationwide expansion of AMTS will cause interference to TV reception. We are confident that the safeguards built into our rules concerning the design and operation of AMTS are sufficient to protect against any potential for interference. Our conclusion is further bolstered by our experience with Watercom's AMTS system and with land mobile operations adjacent to TV channels 14 and 69. Therefore, we conclude that the A and B channels should be made available to the maritime community on a nationwide basis.

B. Sixty Percent Coverage Rule

22. In a related issue, Section 80.475(b) of the Rules requires an AMTS system to cover 60 percent of a navigable waterway. Waterways less than 240 kilometers (150 miles) long must be covered in their entirety. The purpose of these requirements is to provide for integrated systems that offer coverage over marine shipping routes and to exclude from the AMTS band individual VHF coast stations. In the *NPRM*, we proposed to delete these requirements from the rules to permit greater flexibility in the design of AMTS systems. Although we proposed to delete the specific percentage and mileage requirements, we requested comment on whether there is a need for some minimal area coverage requirement or other incentive to encourage interoperability over a substantial portion of a waterway or coastline.

23. Watercom recommends that the 60 percent rule should be retained for inland waterways. Watercom Comments at 5-9. It states that continuity of service has always been a goal. Local coverage is available through conventional VHF public coast stations. Complaints about the inconvenience of dealing with a series of individual coast stations, in fact, led to the creation of the AMTS. Watercom acknowledges that a different standard would be needed for coastal and other areas due to different geography and different navigational needs. It suggests that an applicant be held to a systematization concept by being required to define a navigational area based on demographic and other considerations. Similarly, AWO urges continuation of the system concept and the 60 percent rule for inland waterways. It points to past problems with gaps and quality with VHF public coast stations. AWO Comments at 2.

24. Maritel feels that the 60 percent rule could be eliminated without any substitute. It argues that market forces would prevent any undesirable fractionalization of service. Maritel also argues that the expense of an AMTS is too great to set up just one station. Maritel Comments at 22-23; Reply Comments at 12. Some broadcasters also commented favorably on eliminating the 60 percent rule. They feel it would permit greater flexibility in design of systems and permit locating stations where they would be less likely to cause interference to TV reception. AMST Comments at 13 n. 3; WNET(TV) and Wilson Comments at 5.

25. On balance, we are persuaded by Watercom's reasoning and will retain the 60 percent rule for inland waterways. Retaining the 60 percent rule will assure substantial coverage of a river by an AMTS system. Because there are other adequate protections against interference to TV reception, the rule need not be changed for that reason. Additionally, it is unlikely that system operators would want to bypass populated areas in the coverage of a river. We will, however, ensure continuity of service along portions of the Atlantic, Pacific and Gulf of Mexico coasts by requiring the applicant to define and serve a major navigational area rather than satisfy the 60 percent area coverage requirement for the entire coast line.

C. Blanket Licensing

26. Currently we license the AMTS operator and the ship users. We proposed to include the ship users' units under the AMTS operator's license as a part of the system, and to eliminate licensing the users individually. This plan would simplify licensing. An example of this type of blanket or system licensing is found in the common carrier Domestic Public Land Mobile Service. *See Individual Radio Licensing Procedures*, 77 FCC 2d 84 (1980). A similar approach is used in the cellular radio service and for private carriers operating on frequencies below 800 MHz in the private land mobile radio services (*See* 47 C.F.R. § 90.179 (c)). Blanket or system licensing would not free the users from complying with operational rules, but it would free them of any requirement to obtain an FCC license before beginning AMTS operations. As soon as a service agreement was reached with the AMTS licensee, service could begin. This proposal was not opposed and was supported by Watercom, Maritel and AWO. Watercom observed that mobiles cannot operate independent of the AMTS operator. Watercom Comments at 10-11. Maritel observed that individual licensing of AMTS users has proved to be of little utility. Maritel Comments at 21. Therefore, we are amending the rules as proposed to provide for blanket licensing of AMTS users.

IV. CONCLUSION

27. We believe that the changes proposed in this proceeding will enhance the use of the electromagnetic spectrum by allowing more AMTS operators to provide service and, in turn, more users to benefit from AMTS service while fully protecting TV reception. Accordingly, we are amending Parts 2 and 80 to provide for nationwide (*i.e.*, throughout the 50 states) use of AMTS on channels A and B. We also are implementing blanket licensing of AMTS systems. We are modifying the 60 percent rule to accommodate the needs of AMTS systems along the coasts, lakes and bays. We will address the issue of expanding the AMTS on channels C and D at a later date.

28. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, we certify that these rules will not have a significant economic impact on a substantial number of small entities. The rules make additional frequencies available to maritime users in the U.S. A negative impact is not expected for any entity. An increase in the communications services available to the maritime industry should result.

29. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours on the public.

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Parts 2 and 80 of the Commission's Rules ARE AMENDED as set forth in the Appendix below effective **March 11, 1991.**

31. IT IS FURTHER ORDERED that a copy of this Report and Order will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 2 and 80 of Chapter I of Title 47 the the Code of Federal Regulations are amended as follows:

Part 2: Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by removing footnote NG 121 from column 5 of the 216-220 MHz band and by removing the text of the footnote at the end of the table, Section 2.106 Table of Frequency Allocations.

Part 80 -- Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 U.S.T. 3450, 3 U.S.T. 4726, 12 U.S.T. 2377, unless otherwise noted.

2. Section 80.5 is amended by revising the definition of Automated maritime telecommunications system to read as follows:

§ 80.5 Definitions.

* * * * *

Automated maritime telecommunications system (AMTS). An automatic, integrated and interconnected maritime communications system.

* * * * *

3. Section 80.29(a) is amended by adding one additional entry at the end of the table, to read as follows:

§ 80.29 Changes during license term.

(a) * * *

Type of Change	Required action
* * * * *	
Increased number of mobiles (AMTS)	Written notice to the Commission.

* * * * *

4. A new section 80.54 is added to read as follows:

§ 80.54 Automated Maritime Telecommunications System (AMTS)-System licensing.

AMTS licensees will be issued blanket authority for a system of coast stations and mobile units (subscribers). AMTS applicants will specify the maximum number of mobile units to be placed in operation during the license period.

5. Section 80.215 is amended by revising paragraph (h)(3), by removing paragraph (h)(5) and redesignating paragraph (h)(6) as (h)(5) to read as follows:

§ 80.215 Transmitter power.

* * * * *

(h) * * *

(3) When located as described in paragraph (h)(2) of this section, the coast station (or stations affecting the same TV Grade B contour) will be authorized if the applicant's plan has limited the interference contour(s) to fewer than 100 residences or if the applicant:

* * * * *

6. Section 80.385 is amended by revising paragraph (a)(1) to read as follows:

§ 80.385 Frequencies for automated systems.

* * * * *

(a) * * *

(1) The Automated Maritime Telecommunications System (AMTS) is an integrated and interconnected maritime communications system.

* * * * *

7. Section 80.475 is amended by removing paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (a) and (b); and by revising new paragraph (a) introductory text to read as follows:

§ 80.475 Scope of Service of the Automated Maritime Telecommunications System (AMTS).

(a) AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service along more than 60% of each of one or more navigable inland waterways. Inland waterways less than 240 kilometers (150 miles) long must be served in their entirety. AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline must define a substantial navigational area and show how the proposed system will provide continuity of service for it. A separate Form 503 is not required for each coast station in a system. However, the applicant must provide the technical characteristics for each proposed coast station, including transmitter type, operating frequencies, emissions, transmitter output power, antenna arrangement and location.

* * * * *

8. Section 80.1169 and the title "AUTOMATED SYSTEMS" immediately preceding it are removed and reserved.

FOOTNOTES

[1] Comments and/or Reply Comments were timely filed by Waterway Communications System, Inc. (Watercom); the Association of Maximum Service Telecasters (AMST); WJG Maritel Corporation and Riverphone, Inc. t/a Maritel (Maritel); TV Answer, Inc.; Westinghouse Broadcasting Company, Inc.; WOKR Partners and WTVT Holdings, Inc.; WLOX Television, Inc.; the Association of American Railroads; American Waterways Operators (AWO); WRLH, Inc.; the Rocky Mountain Corporation for Public Broadcasting; CBS, Inc.; Viacom International Inc.; Wabash Valley Broadcasting Corporation; Great Western Broadcast-

ing Corp. and WVEC Television, Inc.; Educational Broadcasting Corporation and Wilson Communications, Inc. (WNET(TV) and Wilson); Cosmos Broadcasting Corporation; KCOP Television, Inc.; KTVE, Inc.; KTRK, Inc.; Narragansett Television Company of California, Inc.; Kelly Television Co. and WTVG, Inc.; VideoIndiana, Inc.; and Post-Newsweek Stations, Florida, Inc.

[2] Half-IF interference is a phenomenon caused by mixing of radio frequency signals within a TV receiver. Nonlinearities in the receiver produce a second harmonic of an interfering signal (*e.g.* an AMTS signal), which mixes with the second harmonic of the TV receiver local oscillator to create interference which will be passed through the TV receiver IF filter.

[3] *See Maritel*, 3 FCC Rcd 4690 (1988), in which we denied Maritel's request for waiver of the mileage separation requirement for Group C and D channels from TV channel 13. We stated there that such action should be considered in a rule making proceeding.

[4] *NPRM* at paras. 3-4, 13, 15-17.

[5] In contrast, WLOX suggests that the lack of complaints shows that the current system is working (*i.e.*, no interference) and should not be changed. WLOX Comments at 3.

[6] In *Digital Organs* we denied a request for exemption from the verification procedures for manufacturers of organs used in churches. Verification essentially requires the manufacturer to test each device for complance with specified parameters before marketing it. We noted there, among other things, that sources of radio frequency interference are often difficult to identify and locate.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON CONAP'S PETITION FOR INVESTIGATION OF ADVANCED INTELLIGENT NETWORK

On November 16, 1990, the Coalition of Open Network Architecture Parties (CONAP) filed a petition requesting that the Commission initiate an investigation pursuant to Section 218 of the Communications Act. CONAP specifically requests that the Commission investigate: (1) the architecture that the Regional Bell Operating Companies (RBOCs) intend to use in implementing the Advanced Intelligent Network (AIN); (2) the architecture of the switches that the RBOCs have purchased or intend to purchase in 1990-93; and (3) the RBOCs' intentions with respect to implementation of a modular and transparent network architecture. CONAP proposes a set of questions that it believes will assist the Commission in framing an investigation. CONAP also requests that the Commission require the BOCs to address the issues raised in its petition when the BOCs file their upcoming ONA amendments.

Interested parties should file comments on this petition by *February 21, 1991*, and reply comments by *March 11, 1991*,with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Steet, N.W., Suite 140, Washington, D.C. 20037. Copies of CONAP's petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-08

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: January 17, 1991; Released: January 25, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaint alleging that defendant's rates for 1988 were unjust and unreasonable in violation of 47 U.S.C. § 201(b). AT&T maintained defendant had overstated its interstate revenue requirements. On January 2, 1991, the parties filed a joint motion to dismiss the complaint with prejudice. The parties state that all claims in the action have been compromised and settled between the parties, with defendants admitting no liability.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1991

AT&T AND LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

The American Telephone and Telegraph Company and the following local exchange carriers filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs for the quarter ended December 31, 1990: The Ameritech Operating Companies, Bell Atlantic, BellSouth Corporation, Central Telephone Company, NYNEX Telephone Companies, Rochester Telephone Corporation, Southwestern Bell Telephone Company, Southern New England Telephone Company and U S West.

Parties may file comments on the proposed revisions to the cost manuals no later than **February 22, 1991.** Replies should be filed by **March 11, 1991.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-481

In the Matter of
Amendment of Part 90 of the
Commission's Rules Concerning
the Construction, Licensing, and
Operation of Private Land Mobile
Radio Stations

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

ORDER EXTENDING REPLY COMMENT PERIOD

Adopted: January 16, 1991; Released: January 25, 1991

By the Chief, Private Radio Bureau:

1. On October 11, 1990, the Commission adopted a *Notice of Proposed Rule Making* in the above captioned matter. *Notice of Proposed Rule Making*, PR Docket No. 90-481, 5 FCC Rcd 6401 (1990). The original deadlines for comments and reply comments were December 24, 1990 and January 8, 1991, respectively. On November 29, 1990, the Special Industrial Radio Service Association, Inc. (SIRSA) filed a motion requesting an extension of the deadlines for comments and reply comments by approximately two weeks. We approved SIRSA's request and extended the deadlines until January 8, 1991 for comments and January 24, 1991 for reply comments. *Order Extending Comment Period*, PR Docket No. 90-481, DA 90-1775 (released December 11, 1990).

2. On January 15, 1991, the American SMR Network Association, Inc. (ASNA) filed a motion requesting an extension to file reply comments until February 11, 1991. Because of the number of comments submitted to the Commission, ANSA believes that a brief additional period to review all comments would well-serve the public interest.

3. Extensions of time are not routinely granted. *See* 47 C.F.R. § 1.46(a). As we stated in the order extending the comment period, the rules proposed in this proceeding have a potential impact on virtually every private radio licensee. In some instances, the loss of operating authority could result. The brief length of the requested extension would ensure the development of a complete record in this proceeding without causing undue delay. We therefore find good cause to grant the extension requested.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that all interested parties will have until **February 11, 1991** to file reply comments in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The BellSouth Telephone Companies — Transmittal No. 350

Revisions to Tariff F.C.C. No. 4

ORDER

Adopted: January 15, 1991; Released: January 16, 1991

By the Chief, Common Carrier Bureau:

1. On October 19, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 350, to offer a rate stability plan (Plan) for their special access voice grade local and interoffice channels. The Plan provides that a customer may be eligible for a freeze of recurring rates, lasting for any period selected by the customer ranging from 36 to 60 months, if the customer has at least 500 voice grade access lines. In return for the rate freeze, the customer must agree to increase its special access voice grade demand by at least 10 percent per year for each of the first three years of the chosen period and to convert to the Plan all of its existing voice grade lines, and to include any new ones as well. BellSouth Tr. 350 Description and Justification (D&J) at 1-3. If the customer fails to meet the demand growth requirement in a given year or if the customer terminates its Plan before the end of its elected period, it must pay certain charges. *Id.* at 6-9. In addition, the customer must pay a nonrecurring charge for the administrative costs of BellSouth's conversion of the associated billing operations to the frozen rate status. *Id.* at 9-10. The tariff is scheduled to take effect on January 17, 1991.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to suspend and investigate BellSouth Transmittal 350 for the same reasons it advanced against a "very similar" rate stability plan proposed by Bell Atlantic, which took effect on January 31, 1989.[1] Sprint then summarily lists and incorporates by reference the arguments it made in its petition against the Bell Atlantic plan.[2] The substantive points in Sprint's previous petition against Bell Atlantic Transmittal 266 include lack of cost support, arbitrary conditions for customer eligibility and the imposition of penalties, the potential for cross-subsidies, and concerns regarding assertedly unreasonable discrimination.

3. BellSouth responds that the Bell Atlantic Plan and the BellSouth Plan are not completely similar in all material respects. BellSouth argues that to the extent they are not similar, Sprint's instant petition is irrelevant, and to the extent they are similar, the Commission has already rejected Sprint's arguments in its action on the Bell Atlantic Plan. Accordingly, BellSouth concludes, Sprint's instant petition should be summarily denied. BellSouth Reply at 2. BellSouth also replies that: there is adequate cost support for its Plan; the 500-circuit cut-off requirement is justified by the structure of BellSouth's marketing organization and the cost/benefit considerations regarding preservation of its voice grade demand; no cross-subsidy will result from the Plan; and the Plan is not discriminatory because it is entirely optional and open to any qualified customer willing to agree to it. *Id.* at 2-5

4. The Common Carrier Bureau has reviewed Transmittal 350, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions filed by BellSouth warrant suspension or investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 350, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 266, 4 FCC Rcd 1393 (Com.Car.Bur. 1989).

[2] Bell Atlantic Telephone Companies Transmittal No. 266, US Sprint Petition for Rejection or Alternatively Suspension and Investigation, filed Oct. 13, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2033

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: January 15, 1991; Released: January 15, 1991

By the Chief, Common Carrier Bureau:

1. On October 18, 1990, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2033, to modify its application of non-recurring charges (NRCs) associated with customer-initiated moves of certain SWB switched, special, and MegaLink access facilities. Transmittal 2033 Description and Justification (D&J) at 1-2. Presently, SWB treats such moves as separate transactions, consisting of disconnection of an existing facility and then connection of a new one. Under Transmittal 2033, such moves would be treated as a single transaction, called a "rollover," and would involve a reduced NRC charge, plus the normal access order charge, for moves from voice grade to DS1 facilities, from DS1 to DS3 facilities, and from copper to fiber optic facilities. *Id.* at 2-4. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or, alternatively, to suspend and investigate Transmittal 2033,[1] and SWB replied.

2. MFS contends that SWB's application of rollover charges amounts to discounts designed to induce large customers to migrate from SWB's existing high capacity services to even higher ones, leaving in their wake unneccessary duplication of facilities and services and stranded plant. MFS Petition at 1-3. In addition, MFS describes SWB's cost support as flawed and inadequate under the requirements of Section 61.38 of the Commission's Rules, especially with respect to SWB's projections of demand for DS3 facilities. *Id.* at 3-7. MFS also claims that SWB's rollover proposal is geographically discriminatory because, in practice, the discounted charge will be available only to customers in dense urban locations where fiber optic facilities have been or will be installed. *Id.* at 7-9.

3. SWB replies that all of the Bureau's concerns about cost support for Transmittal 2002, its previous rollover filing which the Bureau rejected,[2] have now been cured in Transmittal 2033. According to SWB, MFS has not challenged this material under the criteria set forth in that Order. SWB Reply at 2. SWB next claims that the other arguments in the instant MFS petition are nearly identical with those in MFS's petition against Transmittal 2002, and that the Bureau has denied them in the *Rollover Rejection Order*. *Id.* SWB then responds to MFS's claim that its cost support data are inadequate, stating that there is sufficient demand for rollovers. *Id.* at 3-7. Finally, SWB responds that rollover charge discounts do not discriminate in favor of customers in urban areas since rollovers are offered at the same rates to all customers, regardless of location. Moreover, SWB states, the lower cost of rollovers is not the product of discounting, but rather reflects the lower cost of treating the intra-premise move as a single transaction. *Id.* at 8-10.

4. The Common Carrier Bureau has reviewed SWB's Transmittal 2033, MFS's petition, and SWB's reply. We conclude that no compelling argument has been presented that the tariff revisions filed by SWB are patently unlawful so as to require rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or, alternatively, to suspend and investigate Southwestern Bell Telephone Company's Tariff F.C.C. No. 68, Transmittal No. 2033, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

6. IT IS FURTHER ORDERED that the motion to accept late-filed pleading by Metropolitan Fiber System, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petitions against Transmittal 2033 were due on Friday, November 2, 1990. MFS filed its petition against Transmittal 2033 on Monday, November 5, accompanied by a motion to accept late-filed pleadings, citing unanticipated and unavoidable problems with its word processing system. SWB opposed the motion in its reply, stating that it was burdensome to SWB because the due date for its reply remained the same. On balance, we believe that MFS has demonstrated sufficient cause for its short delay in filing a petition against Transmittal 2033, and we therefore grant the motion.

[2] Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Tr. No. 2002, 5 FCC Rcd 5971 (Com.Car.Bur. 1990) (*Rollover Rejection Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-1

In the Matter of

Amendment of Part 15 of the
Commission's rules to
Implement the Provisions
of the Television Decoder
Circuitry Act of 1990

NOTICE OF PROPOSED RULE MAKING

Adopted: January 3, 1991; Released: January 4, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend its rules to amplement the provisions of the Television Decoder Circuitry Act of 1990 (Decoder Act).[1] This legislation requires that most new television receivers marketed in the United States after July 1, 1993, be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions.[2] The legislation also requires that the Commission promulgate rules providing performance and display standards for such built-in decoder circuitry.

BACKGROUND

2. Closed-caption information is permitted to be transmitted as part of the television broadcast signal in accordance with Section 73.682(a)(22) of the Commission's rules. [3] However, the rules do not specify either the information encoding format or the resulting display characteristics. In a 1980 engineering report, the Public Broadcasting Service (PBS) established signal and display specifications for closed captioning.[4] The National Captioning Institute (NCI) also established closed-caption decoder performance specifications in 1985.[5]

3. The Decoder Act was enacted into law on October 15, 1990. The purpose of this legislation is to serve the needs of the deaf and hearing-impaired and others by expanding the accessibility of closed-caption technology. The legislation is intended to reduce significantly the cost to consumers to receive closed captioning, make closed captioning more widely available, and create market incentives for broadcasters to invest in and provide more closed-captioned programming.[6]

4. The Decoder Act amends the Communications Act of 1934 by:

(1) assigning the Commission responsibility for requiring that television receivers with picture screens 13 inches or greater in size, when manufactured or imported for use in the United States, be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions;

(2) making it illegal to ship in interstate commerce, manufacture, assemble, or import any television receiver that is subject to closed-caption decoder requirements except in accordance with Commission rules;

(3) requiring the Commission to promulgate rules providing performance and display standards for such built-in decoder circuitry;

(4) requiring that the built-in decoder circuitry be able to receive and display closed captions that are transmitted on line 21 of the vertical blanking interval and that conform to the PBS/NCI specifications; and,

(5) directing the Commission to take appropriate action to ensure that closed-captioning service continues to be available as new video technology is developed.

The changes to the Communications Act will become effective on July 1, 1993. However, the Decoder Act directs the Commission to promulgate rules implementing the legislation within 180 days.[7]

5. Congress indicated that the Commission's performance and display standards must ensure that television viewers can receive and read closed captions with the same clarity and consistency, and to the same extent, as viewers would be able to receive and read closed captions produced entirely in accordance with the PBS/NCI specifications.[8] Congress did not intend, however, to require the standardization of a specific decoding chip or specific decoding circuitry, but simply to mandate that television receivers be capable of decoding and displaying closed captions adequately.[9] It was envisioned that television receiver manufacturers would be permitted to develop cost-effective approaches to closed-caption decoding, and the Commission was instructed to "pay due regard to considerations of cost-effectiveness and evolving technical capability, as well as the benefits to the competitive process of allowing manufacturers latitude consistent with the purposes of the bill."[10]

DISCUSSION

6. In response to the legislation, a task force consisting of representatives from the Electronic Industries Association (EIA) R-4 Television Receiver Committee,[11] and from several organizations that provide television-program captioning, prepared a receiver performance and display standard.[12] This standard was derived from the PBS/NCI specifications. The task force considered the costs associated with implementing certain aspects of the PBS/NCI specifications, as well as alternatives. The task force also considered the effects of any proposed changes on existing closed-caption decoders and programming that has already been closed captioned. Finally, the task force considered whether additional features were needed.

7. We have included a copy of the task force's report and proposed standard in the Appendix of this Notice. This standard contains certain new features. In addition, other existing features of the PBS/NCI specifications are changed to make them optional or to allow them to be

implemented in new ways. The Senate Report accompanying this legislation points out that the Commission has some flexibility in complying with the Congressional intent. For instance, even though Congress found that the technology will soon exist to provide closed captioning at a nominal cost, we are permitted to take manufacturers' costs into consideration. Whether we may make optional certain features of the PBS/NCI specifications without functional alternatives, as the task force has recommended in some instances, is less clear. Furthermore, we question if the Congress intended to permit decoders built into television receivers to have fewer capabilities than existing decoders.[13] In order to determine whether we should adopt in our rules this standard, with or without change, we urge interested parties to comment on the task force's proposed standard in general, and on the specific issues discussed below in particular.

A. New Features

8. The task force added features to their standard that would give closed-caption service providers new flexibility and efficiency in performing closed captioning. These features would allow the display of captions anywhere on a television screen,[14] and would provide four new instructions that would make closed-caption transmissions more efficient.[15]

9. In determining whether to require these new features, we are mindful of ongoing endeavors to develop decoding circuits that would be used in television receivers subject to our forthcoming regulations. Present efforts, some nearing completion, are based solely on the PBS/NCI specifications and have not contemplated the new features proposed by the task force. Adopting requirements embodying these features could delay the introduction of decoding chips under development, and therefore delay the widespread availability of closed captioning. One alternative might be to adopt the new features but to make their inclusion in any decoding circuitry optional. A second alternative might be to establish a transition period during which incorporation of the new features would be optional. We request comments on these alternatives and suggestions on how long a transition period might be necessary.

B. Changed Features

10. *Color Characters.* The PBS/NCI specifications permit a closed-caption provider to change the color of characters in a caption. Color can be used to provide clarity, such as identifying different speakers, or can be used for emphasis. It is regularly used in closed captioning in other parts of the world. However, current U. S. closed-caption decoders operate external to television receivers and, due to technical difficulties and cost considerations associated with that external operation, do not display color characters. Once closed-caption decoding circuitry is built into television receivers, as is required by the Decoder Act, it should be easier to generate and display color characters. Nevertheless, the task force's proposed standard makes optional the display of characters in different colors. We request comments on whether the ability to display characters in color is a significant feature of modern closed-captioning systems, and whether it should be made optional or mandatory. In addition, we request specific information on the costs of providing color characters.

11. *Italic Characters.* Closed-caption service providers maintain that italics are essential to properly conveying the information in a caption.[16] Television manufacturers, on the other hand, have expressed concern about the difficulty of generating legible italic characters. The task force proposes to allow the use of either italic characters or standard characters that are modified by slanting. The task force also proposes to allow italics to be displayed by reversing the color of a character with that of the character background. We ask comment on the adequacy of these alternatives.

12. *Lower-case Characters.* Lower-case characters are not currently transmitted during the closed captioning of live programming. In addition, they are not used extensively in the closed captioning of words spoken during recorded programs. Lower-case characters are, however, used to indicate sound effects or whispered speech, to display speakers' names, and for certain plural and possessive words. In addition, to the extent that closed captioning may be used for education purposes as envisioned by the Congress (*e.g.*, to teach reading), the ability to display lower-case characters may be important. Television receiver manufacturers are concerned, however, that lower-case characters on inexpensive television receivers would be illegible. The task force's proposed standard provides a transition period, until January 1, 1996, during which television receivers that use a character resolution of 5 by 7 dots, or less, may be manufactured to display upper-case characters in lieu of lower-case characters. This transition period would allow manufacturers to develop the necessary cost-effective technology to display legible lower-case characters on inexpensive television receivers. Any television receiver which does not display lower-case characters would be required to have a label, and information in the owner's manual, indicating that the receiver displays closed captioning in upper-case only. We invite specific comment on the costs and difficulties of incorporating the display of lower-case characters into inexpensive television receivers, and whether the transition provisions proposed by the task force would impose a particular difficulty on the users of closed captioning.

13. *Character Background.* The PBS/NCI specifications require that all characters be displayed against a black background to enhance readability. Television receiver manufacturers want some flexibility to use, instead, characters that are edged, highlighted, or would otherwise stand out. This would allow more of the television picture to be viewable when closed captioning is displayed. The task force's proposed standard does not require the black background. Rather, characters are required to be separated clearly from the video background over which they are placed.[17]

14. The ability to distinguish characters from their background is absolutely essential to closed captioning. The use of a black background virtually assures this. However, television sports and news programs routinely display legible characters over video pictures without a black background. We recognize the desirability of being able to see both the caption and the complete video picture, and we believe that television receiver manufacturers should be given flexibility to develop circuitry that would clearly display closed-caption characters without a black background. We are concerned, however, that the task force's proposed standard may not provide enough specificity to ensure that closed captions can be read clearly over all kinds of video pictures. Thus, we invite

comment on this aspect of the task force's proposed standard. We request specific discussion on changes that may be needed or whether a black background should be required.

15. *Smooth Scrolling*. There are three styles used in presenting captions: roll-up, pop-on, and paint-on. In roll-up style captioning, which is often used to caption live programs, new words are displayed on the bottom row of the caption. When that row is complete, the characters roll upwards (or scroll) so that a new row of characters can be displayed. The PBS/NCI specifications include detailed requirements that attempt to provide smooth scrolling of the displayed rows. Television manufacturers, in discussions during the task force's meetings, have indicated that they intend to provide smooth scrolling of roll-up captions. However, they desire more flexibility than is provided in the PBS/NCI specifications. The task force's proposed standard does not address smooth scrolling. We believe that smooth scrolling is an essential element of roll-up captioning and propose to make it a requirement. We realize the determination of what constitutes smooth scrolling may be subjective. Thus, we invite comment on whether more specific requirements are needed.

16. *Caption Location and Size*. The PBS/NCI specifications allow the display of closed captions on four lines at the top and four lines at the bottom of the television screen.[18] As a practical matter, however, closed captions of more than four lines are rarely used, perhaps because so much of the television picture would be obscured. The task force's proposed standard would add new flexibility for closed-caption service providers to locate captions anywhere on the screen; however, no more than four lines of captions could be displayed at one time. We invite comment on whether this change is appropriate. We are particularly interested in whether the cost savings and flexibility of the task force's proposed standard outweighs the current ability to display more than four lines of captions.

17. *Caption Channels*. The transmission capabilities associated with using line 21 of the vertical blanking interval make it feasible for more than one channel of caption information to be transmitted. The PBS/NCI specifications permit two distinct channels to be used under certain circumstances so that a program could be captioned in two languages or for two types of audiences. At present, only single-channel captioning is provided routinely. Indeed, many existing closed-caption decoders only support a single caption channel. The task force's proposed standard requires just single-channel capability.

18. Questions have been raised as to whether line 21 transmissions can provide the data rate necessary to caption two channels simultaneously. We note that, because of the high word rate, live programs are captioned on a single channel as a matter of practice. The captioning of recorded programs can be done in a more planned manner, thereby facilitating captioning on two channels. Also, it is quite possible that the demand for, and use of, closed captioning will grow once the public has television receivers with decoding capability. At the same time, we are reluctant to require two-channel capability if it is unlikely to be used. Accordingly, we seek specific comments on the costs associated with providing for two caption channels and whether it is likely that two caption channel usage will develop.

19. *Text Services*. The Commission's rules, as well as the PBS/NCI specifications, allow the transmission of text information when no closed-caption information is being transmitted. This text information is displayed on the full television screen, making the television programming no longer visible. While we understand that there are a few organizations using this capability to provide desirable services to the public, it is not clear that the Decoder Act was intended to require television receivers to be able to display text information. Although most existing decoders can display such text information, the standard proposed by the task force allows the display of text information to be optional. We request comment on this approach.

PROCEDURAL MATTERS

20. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the Commission's initial analysis is as follows:

I. Reason for Action: The promulgation of these rules is mandated by the Television Decoder Circuitry Act of 1990, Pub. L. 101-431.

II. Objective: These rules are intended to serve the needs of the deaf and hearing-impaired and others by expanding the availability of closed-caption television decoding equipment, thereby creating market incentives for the development of more closed-captioned programming. These rules would set performance and display standards for closed-caption decoder circuitry within television receivers, and would prohibit the manufacture, assembly, importation, or interstate shipment of noncompliant receivers.

III. Legal Basis: This action is proposed in accordance with Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and in accordance with the Television Decoder Circuitry Act of 1990.

IV. Description, potential impact and number of small entities affected: These rules would affect only the manufacturers of television receivers with picture screens 13 inches or larger. There are no known small entities manufacturing such television receivers.

V. Recording, record keeping and other compliance requirements: The Commission's rules require television receivers to be verified for compliance with applicable FCC technical requirements. *See* Sections 15.101, 15.117, and 2.951, *et seq*. Documentation concerning the verification must be kept by the manufacturer or importer. The rules ultimately adopted in this proceeding will require that television receivers comply with a closed-caption performance and display standard. However, verification testing regarding closed captioning, and the associated record keeping requirements, is not necessary because compliance with the closed-caption standard can easily be determined during the television receiver design process. The Commission may, of course, ask manufacturers and importers to document upon occasion how a particular television receiver complies with the closed-caption requirements.

VI. Federal rules which overlap, duplicate or conflict with the proposed rule: None.

VII. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives: None.

21. *Comment Provisions.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before February 15, 1991, and reply comments on or before March 4, 1991. In order to comply with the requirement of the Decoder Act that FCC rules be promulgated within 180 days of enactment, we will proceed with this *Notice* without furnishing a prior text as provided by Article 607 of the United States-Canada Free-Trade Implementation Act of 1988 (Pub. L. 100-499, 102 Stat. 1851). To do so would frustrate achievement of a legitimate domestic objective. In addition, the Commission is not likely to be able to accommodate requests for extension of these comment periods. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

22. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

24. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

25. *Paperwork Reduction Act Statement.* The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

26. For further information on this proceeding, contact the Technical Standards Branch, Room 7122, Office of Engineering and Technology, FCC, Washington, DC 20554, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Television Decoder Circuitry Act of 1990, Pub. L. 101-431.

[2] Closed captions are used to provide a visual depiction of information simultaneously being provided on the audio portion of a television signal. Captions are considered to be closed because they are only viewable if the user activates a decoder.

[3] This information is transmitted on line 21 of the vertical blanking interval.

[4] *See* Television Captioning for the Deaf: Signal and Display Specifications, Engineering Report No. E-7709-C, Public Broadcasting Service, dated May 1980.

[5] *See* TeleCaption II Decoder Module Performance Specification, National Captioning Institute, Inc., dated November 1985.

[6] *See* Report of the Senate Committee on Commerce, Science, and Transportation on S. 1974, Report 101-393, 101st Congress, 2d Session (1990).

[7] The Commission must, therefore, adopt the final rules in this proceeding by April 12, 1991.

[8] *See* Report of the Senate Committee on Commerce, Science, and Transportation on S. 1974, *supra.*, at 9.

[9] *See id.*

[10] *See id.*

[11] EIA operates the R-4 Television Receiver Committee to create voluntary industry standards for television receivers. This Committee consists, primarily, of representatives from various television manufacturing companies.

[12] *See* Television Receiver Performance Specification for Basic Cloased Captioning Services, Draft Revision 6.0, EIA Standards Proposal, EIA/CEG Television Receiver Committee (R-4), December 7, 1990. A copy is provided in the Appendix.

[13] Most existing decoders do not fully implement the PBS/NCI specifications. For example, the PBS/NCI specifications allow a closed-caption provider to change the color of characters within a caption. Current decoders, however, display only white characters. Also, many existing decoders only support a single caption channel. The PBS/NCI specifications provide for two caption channels.

[14] The PBS/NCI specifications only permit captions to be displayed on the top and bottom portions of the television screen.

[15] *See* Television Receiver Performance Specification for Basic Closed Captioning Services, *supra*., page 14. The new instructions use the mnemonics DER, TO1, TO2, and TO3. They would allow captions that are done on live programming to be easily corrected, and would reduce the number of characters required to specify a caption location.

[16] Closed-caption service providers use italics to indicate phrases in a foreign language, titles of publications, legal cases, names of vessels, and words heard by the audience but not by the dramatic characters, such as voiceovers or narration. Italics are also used to add emphasis.

[17] *See* Television Receiver Performance Specification for Basic Closed Captioning Services, *supra*., p. 2.

[18] However, roll-up style captions are only allowed to be displayed on up to four rows at the bottom of the television screen.

APPENDIX

ELECTRONIC INDUSTRIES ASSOCIATION

December 7, 1990

RECEIVED
DEC 7 - 1990
Technical Standards Branch
Authorization and Evaluation Division

Mr. Richard B. Engleman
Chief, Technical Standards Branch
Office of Engineering & Technology
Federal Communications Commission
2025 M Street NW, Room 7122
Washington, DC 20554

Dear Mr. Engleman:

We are pleased to submit to you the draft proposed EIA Standard, **Television Receiver Performance Specification for Basic Closed Captioning Service.**

The EIA/CEG Television Receiver Committee (R-4) at its October 9th meeting established a Closed Captioning Task Force to develop a Display Standard based on the PBS Engineering Report (E-7709-C; May 1980) and the NCI TeleCaption II Decoder Module Specification (November 1985) as cited in the Television Decoder Circuitry Act of 1990. The task force is comprised of television receiver manufacturers and closed captioning service providers. A list of meetings and attendees is enclosed.

The task force's objective has been to establish display standards for a basic closed captioning service in order to insure compatibility with the existing service and the wide variety of television receivers to be manufactured in compliance with the law after July 1, 1993.

The attached document is the result of two months of hard work by the task force and represents a consensus of the membership with the exception of the National Captioning Institute (NCI). Nevertheless, it is a document that has resulted from the cooperative effort between the television receiver manufacturers and the caption service providers.

On behalf of the task force (with the previously noted exception) we respectfully request incorporation of this document in the forthcoming Notice of Proposed Rule Making.

Sincerely,

TDM/for JS
Julius Szakolczay
Chairman
Closed Captioning Task Force

Thomas Mock
Thomas Mock
Director of Engineering
Consumer Electronics Group

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Closed Captioning Standard Task Force

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CLOSED CAPTIONING TASK FORCE MEETINGS

October 30, 1990 - Ramada O'Hare Hotel - Chicago, IL

NAME	ORGANIZATION
Larry Goldberg	The Caption Center/WGBH
Bob Wolff	Matsushita TV Company
Ed Murphy	EEG Enterprises, Inc.
Kenneth Skinner	Philips Consumer Electronics
Richard Lowell	Sony Corporation of America
Jeffery Puskas	Zenith Electronics
Steve Sigman	Zenith Electronics
John Tesky	Thomson Consumer Electronics
Amnon Salomon	National Captioning Institute
Linda Carson	National Captioning Institute
John Tanaka	JVC Manufacturing Co.
Jeff Hutchins	CaptionAmerica
David Broberg	Mitsubishi Electronics of America
Thomas Mock	EIA/CEG

November 14, 1990 - Wyndham Bristol Hotel - Washington, DC

NAME	ORGANIZATION
Julius Szakolczay	Mitsubishi Electronics of America
David Broberg	Mitsubishi Electronics of America
Larry Goldberg	The Caption Center/WGBH
Bill Posner	EEG Enterprises, Inc.
William Miller	Philips Consumer Electronics
Jack Armstrong	Sanyo Manufacturing Corporation
Richard Lowell	Sony Corporation of America
Kazuhiko Inagaki	Sony Corporation of America
Jeffery Puskas	Zenith Electronics
Steve Sigman	Zenith Electronics
John Tesky	Thomson Consumer Electronics
Linda Carson	National Captioning Institute
Ted Marks	JVC Manufacturing Co.
John Tanaka	JVC Manufacturing Co.
Jeff Hutchins	CaptionAmerica
Bob Burroughs	Panasonic Technologies
Ron Slaymaker	Texas Instruments
Thomas Mock	EIA/CEG

December 3, 1990 - Wyndham Bristol Hotel - Washington, DC

NAME	ORGANIZATION
Julius Szakolczay	Mitsubishi Electronics of America
Larry Goldberg	The Caption Center/WGBH
Dan Glisson	The Caption Center/WGBH
Richard Engleman	FCC
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Edward Murphy	EEG Enterprises, Inc.
Kenneth Skinner	Philips Consumer Electronics
Richard Lowell	Sony Corporation of America
Jeffery Puskas	Zenith Electronics
Steve Sigman	Zenith Electronics
John Tesky	Thomson Consumer Electronics
Linda Carson	National Captioning Institute
Ted Marks	JVC Manufacturing Co.
John Tanaka	JVC Manufacturing Co.
Jeff Hutchins	CaptionAmerica
Joe Foy	Texas Instruments
Thomas Mock	EIA/CEG

Television Receiver Performance Specification for Basic Closed Captioning Services

DRAFT REVISION 6.0
EIA Standards Proposal

EIA/CEG Television
Receiver Committee (R-4)
December 7, 1990

CLOSED CAPTIONING

TELEVISION RECEIVER

PERFORMANCE SPECIFICATION

FOR BASIC SERVICES

1. OPERATING MODES

The television receiver will employ customer-selectable modes of operation for TV and Caption. A third mode of operation, Text, may be included. The Caption and Text Modes may contain data in either of two operating channels, referred to in this document as C1 and C2. The minimum receiver implementation must decode and display C1 captioning. The TV Mode of operation allows the video to be viewed in its original form. The Caption and Text Modes define one or more areas (called "boxes") on the screen within which caption or text characters are displayed.

2. SCREEN FORMAT

The display area for captioning and text shall fall within the SAFE TITLE AREA as defined by SMPTE Recommended Practice # 27.3 - 1989. This display area will be further divided into 15 character rows of equal height and 32 columns of equal width, to provide accurate placement of text on the screen. Vertically, the display area begins on line 43 and is 195 lines high, ending on line 237 on an interlaced display. All captioning and text shall fall within these established columns and rows. The characters must be displayed clearly separated from the video over which they are placed.

2.1 CAPTION MODE

In the Caption Mode, text can appear on up to 4 rows simultaneously anywhere on the screen within the defined display area. In addition, a solid space equal to one column width may be placed before the first character and after the last character of each row to enhance legibility.

The caption area will be transparent anywhere that:

1) No standard space character or other character has been addressed and no accompanying solid space is needed;

2) An accompanying solid space is used and a "transparent space" special character has been addressed which does not immediately precede or follow a displayed character.

3. PRESENTATION FORMAT

In analyzing the presentation of characters, it is convenient to think in terms of a non-visible cursor which marks the screen position at which the next event in a given mode and data channel will occur. The receiver remembers the cursor position for each mode even when data are received for a different address in an alternate mode or data channel.

3.1 SCREEN ADDRESSING

Two kinds of control codes are used to move the cursor to specific screen locations. In Caption Mode, these addressing codes will affect both row and column positioning. In Text Mode, the codes affect only column positioning. In both modes, the addressing codes are optional. Default positions are defined for each mode and style when no addressing code is provided.

The first type of addressing code is the Preamble Address Code (PAC). It assigns a row number and one of eight "indent" figures. Each successive indent moves the cursor four columns to the right (starting from the left margin). Thus, an indent of 0 places the cursor at Column 1, an indent of 4 sets it at Column 5, etc.

The PAC indent is non-destructive. It will not affect the display to the left of the new cursor position on the indicated row.

Note that Preamble Address Codes also set initial attributes for the displayable characters which follow. See Section 6 and the Preamble Address Code table.

The second type of addressing code is the Tab Offset, which is one of three Miscellaneous Control Codes. Tab Offset will move the cursor one, two, or three columns to the right. The character cells skipped over will be unaffected; displayable characters in these cells, if any, will remain intact while empty cells will remain empty, in the same manner that a PAC indent is non-destructive.

3.2 CAPTION MODE

There are three styles of presenting text in Caption Mode: roll-up, pop-on, and paint-on.

Character display varies significantly with the style used, but certain rules of character erasure are common to all styles. A character, once displayed, can be erased by addressing another character to the same screen

location or, in displayed memory, by backspacing over the character from a subsequent location on the same row. The entire displayed memory will be erased instantly by receipt of an Erase Displayed Memory command. Both displayed memory and non-displayed memory will be entirely erased simultaneously by:

- the user switching receiver channels or data channels (C1/C2) or fields (F1/F2) in decoders so equipped; or
- the loss of valid data (see Section 7); or
- selecting non-captioning receiver functions which use the display memory of the decoder.

These are the only instances in which caption memory will be erased. Receipt of an End of Caption command will cause a displayed caption to become non-displayed (and vice versa) without being erased from memory. Changing the receiver to a non-captioning mode which does not require use of the decoder's display memory will leave that memory intact, and the decoder will continue to process data as if the caption display were selected.

3.2.1 ROLL-UP

Roll-up style captioning is initiated by receipt of one of three Miscellaneous Control Codes that determine the maximum number of rows displayed simultaneously, either 2, 3 or 4 contiguous rows. These are the three Roll-Up Caption commands.

The bottom row of the display is known as the "base row". The cursor always remains on the base row. Rows of text roll upwards into the contiguous rows immediately above the base row to create a "window" 2 to 4 rows high.

The Roll-Up command, in normal practice, will be followed (not necessarily immediately) by a Preamble Address Code indicating the base row and the horizontal indent position. If no Preamble Address Code is received, the base row will default to Row 15 or, if a roll-up caption is currently displayed, to the same base row last received, and the cursor will be placed at Column 1. If the Preamble Address Code received contains a different base row than that of a currently displayed caption, the entire window will move intact (and without erasing) to the new base row immediately.

The base row given in the Preamble Address Code takes precedence over the number of roll-up rows given in the Roll-Up Caption command. If the Preamble Address Code indicates Rows 1, 2, or 3 as the base row, any rows which would display above the window will be lost.

Each time a Carriage Return is received, the text in the top row of the window is erased from memory and from the display. The remaining rows of text are each rolled up into the next highest row in the window, leaving the base row blank and ready to accept new text. The cursor is automatically placed at Column 1 (pending receipt of a Preamble Address Code).

Increasing or decreasing the number of roll-up rows instantly changes the size of the active display window, appropriately turning on or off the display of the top one or two rows. A row which is turned off should also be erased from memory.

Characters are always displayed immediately when received by the receiver. Once the cursor reaches the 32nd column position on any row, all subsequent characters received prior to a Carriage Return, Preamble Address Code, or Backspace will be displayed in that column replacing any previous character occupying that address.

The cursor moves automatically one column to the right after each character or Mid-Row Code received. A Backspace will move the cursor one column to the left, erasing the character or Mid-Row Code occupying that location. (A Backspace received when the cursor is in Column 1 will be ignored.)

If a solid space is used for legibility, it should appear when the first displayable character (not a transparent space) or Mid-Row Code is received on a row, not when the Preamble Address Code, if any, is given. A row on which there are no displayable characters or Mid-Row Codes will not display a solid space, even when rolled up between two rows which do display a solid space. If the reception of data for a row is interrupted by data for the alternate data channel or for Text Mode, the display of caption text will resume from the same cursor position if a

Roll-Up Caption command is received and no Preamble Address Code is given which would move the cursor.

Receipt of a Resume Caption Loading command (for pop-on style) or a Resume Direct Captioning command (for paint-on style) will not affect a roll-up display. Receipt of an End of Caption command will erase the roll-up caption.

Receipt of a Roll-Up Caption command will cause any pop-on or paint-on caption to be erased from displayed memory and non-displayed memory.

3.2.2 POP-ON

Pop-on style captioning is initiated by receipt of a Resume Caption Loading command. Subsequent data are loaded into a non-displayed memory and held there until an End of Caption command is received, at which point the non-displayed memory becomes the displayed memory and vice versa. (This process is often referred to as "flipping memories" and does not automatically erase memory.) An End of Caption command forces the receiver into pop-on style if no Resume Caption Loading command has been received which would do so. The display will be capable of 4 full rows, not necessarily contiguous, simultaneous anywhere on the screen.

If no Preamble Address Code is received, the cursor will begin at the same screen position where it was left after the previous caption (or at Row 1, Column 1 when the receiver is first turned on or after a screen erase caused by the user switching data channels or fields or by loss of valid data). Preamble Address Codes can be used to move the cursor around the screen in random order to place captions on Rows 1 to 15. Carriage Returns and Backspaces have no effect on cursor location during caption loading.

The cursor moves automatically one column to the right after each character or Mid-Row Code received. Once the cursor reaches the 32nd column position on any row, all subsequent characters received prior to an End of Caption, or a Preamble Address Code, will

replace any previous character at that location.

If data reception is interrupted during caption loading by data for the alternate caption channel or for Text Mode, caption loading will resume at the same cursor position if a Resume Caption Loading command is received and no Preamble Address Code is given that would move the cursor.

Characters remain in non-displayed memory until an End of Caption command flips memories. The caption will be erased without being displayed upon receipt of an Erase Non-Displayed Memory command, a Roll-Up Caption command, or if the user switches receiver channels, data channels or fields, or upon the loss of valid data (see Section 7).

A pop-on caption, once displayed, remains displayed until one of the standard caption erasure techniques is applied or until a Roll-Up Caption command is received. Characters within a displayed pop-on caption will be replaced by receipt of the Resume Direct Captioning command and paint-on style techniques (see below).

3.2.3 PAINT-ON

Paint-on style captioning is initiated by receipt of a Resume Direct Captioning command. Subsequent data are addressed immediately to displayed memory without need for an End of Caption command.

If no Preamble Address Code is received, the cursor will begin at the same screen position where it was left after the previous caption (or at Row 1, Column 1 when the receiver is first turned on or after a screen erase caused by the user switching receiver channels or data channels or fields or by loss of valid data).

Preamble Address Codes can be used to move the cursor around the screen in random order to display captions on Rows 1 to 15. Carriage Returns have no affect on cursor location during direct captioning. The cursor moves automatically one column to the right after each character or Mid-Row Code is received. Receipt of a Backspace will move the cursor

Receipt of a Backspace will move the cursor one column to the left, erasing the character or Mid-Row Code occupying that location. (A Backspace received when the cursor is in Column 1 will be ignored.) Once the cursor reaches the 32nd column position on any row, all subsequent characters received prior to a Preamble Address Code or Backspace will be displayed in that column replacing any previous character occupying that location.

If the reception of data is interrupted during direct captioning by data for the alternate caption channel or for Text Mode, the display of caption text will resume at the same cursor position if a Resume Direct Captioning command is received and no Preamble Address Code is given which would move the cursor.

Characters remain displayed until one of the standard caption erasure techniques is applied or until a Roll-Up Caption command is received. An End of Caption command leaves a paint-on caption fully intact in non-displayed memory. In other words, a paint-on style caption behaves precisely like a pop-on style caption which has been displayed.

4. CHARACTER FORMAT

Characters are to be displayed on the screen within a character "cell" which is the height and width of a single row and column. The following codes define the displayable character set. Television receivers manufactured prior to January 1, 1996 and having a character resolution of 5 x 7 or less may display the allowable alternate characters in the character table. A label must be on the receiver and information in the owner's manual indicating the receiver displays closed captioning in upper case only.

CHARACTER SET TABLE

SPECIAL CHARACTERS

These require two bytes for each symbol. Each hex coder as shown will be preceded by a 11h for data channel 1 or by a 19h for data channel 2. For example: 19h 37h will place a musical note in data channel 2.

HEX	EXAMPLE	ALTERNATE	DESCRIPTION
30	®	* see note	registered mark symbol
31	°		degree sign
32	½		1/2
33	¿		inverse query
34	™	* see note	trademark symbol
35	¢		cents sign
36	£		Pounds Sterling sign
37	♪		music note
38	à	A	lower-case a with grave accent
39			transparent space
3A	è	E	lower-case e with grave accent
3B	â	A	lower-case a with circumflex
3C	ê	E	lower-case e with circumflex
3D	î	I	lower-case i with circumflex
3E	ô	O	lower-case o with circumflex
3F	û	U	lower-case u with circumflex

* NOTE: The registered mark and trademark symbols are used to satisfy certain legal requirements. There are various legal ways in which these symbols may be drawn or displayed. For example, the trademark symbol may be drawn with the "T" next to the "M" or over the "M". It is prefered that the trademark symbol be superscripted, i.e., XYZ™. It is left to each individual manufacturer to interpret these symbols in any way that meets the legal needs of the user.

STANDARD CHARACTERS

HEX	EXAMPLE	ALTERNATE	DESCRIPTION
20			standard space
21	!		exclamation mark
22	"		quotation mark
23	#		pounds (number) sign
24	$		dollar sign
25	%		percentage sign
26	&		ampersand
27	'		apostrophe
28	(		open parentheses
29	)		close parentheses
2A	á	A	lower-case a with acute accent
2B	+		plus sign
2C	,		comma
2D	-		minus (hyphen) sign
2E	.		period
2F	/		slash
30	0		zero
31	1		one
32	2		two
33	3		three
34	4		four
35	5		five
36	6		six
37	7		seven
38	8		eight
39	9		nine
3A	:		colon
3B	;		semi-colon
3C	<		less than sign
3D	=		equal sign
3E	>		greater than sign
3F	?		question mark
40	@		at sign
41	A		upper-case A
42	B		upper-case B
43	C		upper-case C
44	D		upper-case D
45	E		upper-case E
46	F		upper-case F
47	G		upper-case G
48	H		upper-case H
49	I		upper-case I
4A	J		upper-case J
4B	K		upper-case K
4C	L		upper-case L
4D	M		upper-case M
4E	N		upper-case N
4F	O		upper-case O

HEX	EXAMPLE	ALTERNATE	DESCRIPTION
50	P		upper-case P
51	Q		upper-case Q
52	R		upper-case R
53	S		upper-case S
54	T		upper-case T
55	U		upper-case U
56	V		upper-case V
57	W		upper-case W
58	X		upper-case X
59	Y		upper-case Y
5A	Z		upper-case Z
5B	[		open bracket
5C	é	E	lower-case e with acute accent
5D	]		close bracket
5E	í	I	lower-case i with acute accent
5F	ó	O	lower-case o with acute accent
60	ú	U	lower-case u with acute accent
61	a	A	lower-case a
62	b	B	lower-case b
63	c	C	lower-case c
64	d	D	lower-case d
65	e	E	lower-case e
66	f	F	lower-case f
67	g	G	lower-case g
68	h	H	lower-case h
69	i	I	lower-case i
6A	j	J	lower-case j
6B	k	K	lower-case k
6C	l	L	lower-case l
6D	m	M	lower-case m
6E	n	N	lower-case n
6F	o	O	lower-case o
70	p	P	lower-case p
71	q	Q	lower-case q
72	r	R	lower-case r
73	s	S	lower-case s
74	t	T	lower-case t
75	u	U	lower-case u
76	v	V	lower-case v
77	w	W	lower-case w
78	x	X	lower-case x
79	y	Y	lower-case y
7A	z	Z	lower-case z
7B	ç	C	lower-case c with cedilla
7C	÷		division sign
7D	Ñ		upper-case N with tilde
7E	ñ	Ñ	lower-case n with tilde
7F	▉		solid block

5. CHARACTER ATTRIBUTES

5.1 TRANSMISSION OF ATTRIBUTES

A character may be transmitted with any or all of four attributes: color, italics, underline, and flash. All of these attributes are set by control codes included in the received data. An attribute will remain in effect until changed by another control code or until the end of the row is reached. Each row begins with a control code which sets the color and underline attributes. (White non-underlined is the default if no Preamble Address Code is received before the first character on an empty row.) Attributes are not affected by transparent spaces within a row.

All Mid-Row Codes and the Flash On command are spacing attributes which appear in the display just as if a standard space (20h) had been received.

Preamble Address Codes are non-spacing and will not alter any attributes when used to position the cursor in the midst of a row of characters.

The color attribute has the highest priority and can only be changed by the Mid-Row Code of another color.

Italics has the next highest priority. If characters with both color and italics are desired, the italics Mid-Row Code must follow the color assignment. Any color Mid-Row Code will turn off italics.

If the least significant bit of a Preamble Address Code or of a color or italics Mid-Row Code is a 1 (high), underlining is turned on. If that bit is a 0 (low), underlining is off.

The flash attribute is transmitted as a Miscellaneous Control Code. The Flash On command will not alter the status of the color, italics, or underline attributes. However, any color or italics Mid-Row Code will turn off flash.

Thus, for example, if a red, italicized, underlined, flashing character is desired, the attributes must be received in the following order: a red Mid-Row or Preamble Address Code, an italics Mid-Row Code with underline bit, and the Flash On command. The character will then be preceded by three spaces (two if red was assigned via a Preamble Address Code).

5.2 DISPLAY OF ATTRIBUTES

The underline attribute will be displayed by drawing a line beneath the character in the same color as the character.

The flash attribute will be displayed by causing the character to blank from the display at least once per second.

The italic attribute will be displayed by one of the following methods:

- special italic font, or;
- the modification of the standard font by slanting, or;
- by use of inverse video (i.e., foreground and background color reversal)

The support of the color attributes is optional. If the color attributes are supported, they will be displayed in the color they have been assigned. If color attributes are not supported, the display may be in color, but all color changes will be ignored.

6. CONTROL CODES

There are three different types of control codes used to identify the format, location, attributes, and display of characters: Preamble Address Codes, Mid-Row Codes, and Miscellaneous Control Codes.

Each control code consists of a pair of bytes which are always transmitted together in a single field of line 21 and which are normally transmitted twice in succession to help insure correct reception of the control instructions. The first of the control code bytes is a non-printing character in the range 10h to 1Fh. The second byte is always a printing character in the range 20h to 7Fh. Any such control code pair received which has not been assigned a function is ignored. If the non-printing character in the pair is in the range 00h to 0Fh, that character alone will be ignored and the second character will be treated normally.

If the second byte of a control code pair does not contain odd parity (see Section 7), then the pair is ignored. The redundant transmission of the pair will be the instruction upon which the receiver acts.

If the first byte of the first transmission of a control code pair fails the parity check, then that byte is inserted into the currently active memory as a solid block character (7Fh) followed by whatever the second byte is. Again, the redundant transmission of the pair will be the controlling instruction.

If the first transmission of a control code pair passes parity, it is acted upon immediately. If the next frame contains a perfect repeat of the same pair, the redundant code is ignored. If, however, the next frame contains a different but also valid control code pair, this pair, too, will be acted upon (and the receiver will expect a repeat of this second pair in the next frame). If the first byte of the expected redundant control code pair fails the parity check and the second byte is identical to the second byte in the immediately preceding pair, then the expected redundant code is ignored. If there are printing characters in place of the redundant code, they will be processed normally.

There is provision for optional decoding of a second data channel. The second data channel is encoded with the same control codes and procedures already described. The first byte of every control code pair indicates the data channel (C1/C2) to which the command applies. Control codes which do not match the data channel selected by the user, and all subsequent data related to that control code, are ignored by the receiver.

MID-ROW CODES

DATA CHANNEL 1	DATA CHANNEL 2	ATTRIBUTE DESCRIPTION
11 20	19 20	White
11 21	19 21	White Underline
11 22	19 22	Green
11 23	19 23	Green Underline
11 24	19 24	Blue
11 25	19 25	Blue Underline
11 26	19 26	Cyan
11 27	19 27	Cyan Underline
11 28	19 28	Red
11 29	19 29	Red Underline
11 2A	19 2A	Yellow
11 2B	19 2B	Yellow Underline
11 2C	19 2C	Magenta
11 2D	19 2D	Magenta Underline
11 2E	19 2E	Italics
11 2F	19 2F	Italics Underline

MISCELLANEOUS CONTROL CODES

DATA CHANNEL 1	DATA CHANNEL 2	MNEMONIC	COMMAND DESCRIPTION
14 20	1C 20	RC	Resume Caption Loading
14 21	1C 21	BS	Backspace
14 22	1C 22	AOF	reserved (formerly Alarm Off)
14 23	1C 23	AON	reserved (formerly Alarm On)
14 24	1C 24	DER	Delete to End of Row
14 25	1C 25	RU2	Roll-Up Captions-2 Rows
14 26	1C 26	RU3	Roll-Up Captions-3 Rows
14 27	1C 27	RU4	Roll-Up Captions-4 Rows
14 28	1C 28	FON	Flash On
14 29	1C 29	RDC	Resume Direct Captioning
14 2A	1C 2A	TR	Text Restart
14 2B	1C 2B	RTD	Resume Text Display
14 2C	1C 2C	EDM	Erase Displayed Memory
14 2D	1C 2D	CR	Carriage Return
14 2E	1C 2E	ENM	Erase Non-Displayed Memory
14 2F	1C 2F	EOC	End of Caption (Flip Memories)
17 21	1F 21	TO1	Tab Offset 1 Column
17 22	1F 22	TO2	Tab Offset 2 Columns
17 23	1F 23	TO3	Tab Offset 3 Columns

PREAMBLE ADDRESS CODES

First byte of code pair	ROW 1	ROW 2	ROW 3	ROW 4	ROW 5	ROW 6	ROW 7	ROW 8	ROW 9	ROW 10	ROW 11	ROW 12	ROW 13	ROW 14	ROW 15
Data Channel 1	11	11	12	12	15	15	16	16	17	17	10	13	13	14	14
Data Channel 2	19	19	1A	1A	1D	1D	1E	1E	1F	1F	18	1B	1B	1C	1C
Second byte of code pair															
White	40	60	40	60	40	60	40	60	40	60	40	40	60	40	60
White Underline	41	61	41	61	41	61	41	61	41	61	41	41	61	41	61
Green	42	62	42	62	42	62	42	62	42	62	42	42	62	42	62
Green Underline	43	63	43	63	43	63	43	63	43	63	43	43	63	43	63
Blue	44	64	44	64	44	64	44	64	44	64	44	44	64	44	64
Blue Underline	45	65	45	65	45	65	45	65	45	65	45	45	65	45	65
Cyan	46	66	46	66	46	66	46	66	46	66	46	46	66	46	66
Cyan Underline	47	67	47	67	47	67	47	67	47	67	47	47	67	47	67
Red	48	68	48	68	48	68	48	68	48	68	48	48	68	48	68
Red Underline	49	69	49	69	49	69	49	69	49	69	49	49	69	49	69
Yellow	4A	6A	4A	6A	4A	6A	4A	6A	4A	6A	4A	4A	6A	4A	6A
Yellow Underline	4B	6B	4B	6B	4B	6B	4B	6B	4B	6B	4B	4B	6B	4B	6B
Magenta	4C	6C	4C	6C	4C	6C	4C	6C	4C	6C	4C	4C	6C	4C	6C
Magenta Underline	4D	6D	4D	6D	4D	6D	4D	6D	4D	6D	4D	4D	6D	4D	6D
White Italics	4E	6E	4E	6E	4E	6E	4E	6E	4E	6E	4E	4E	6E	4E	6E
White Italics Underline	4F	6F	4F	6F	4F	6F	4F	6F	4F	6F	4F	4F	6F	4F	6F
Indent 0	50	70	50	70	50	70	50	70	50	70	50	50	70	50	70
Indent 0 Underline	51	71	51	71	51	71	51	71	51	71	51	51	71	51	71
Indent 4	52	72	52	72	52	72	52	72	52	72	52	52	72	52	72
Indent 4 Underline	53	73	53	73	53	73	53	73	53	73	53	53	73	53	73
Indent 8	54	74	54	74	54	74	54	74	54	74	54	54	74	54	74
Indent 8 Underline	55	75	55	75	55	75	55	75	55	75	55	55	75	55	75
Indent 12	56	76	56	76	56	76	56	76	56	76	56	56	76	56	76
Indent 12 Underline	57	77	57	77	57	77	57	77	57	77	57	57	77	57	77
Indent 16	58	78	58	78	58	78	58	78	58	78	58	58	78	58	78
Indent 16 Underline	59	79	59	79	59	79	59	79	59	79	59	59	79	59	79
Indent 20	5A	7A	5A	7A	5A	7A	5A	7A	5A	7A	5A	5A	7A	5A	7A
Indent 20 Underline	5B	7B	5B	7B	5B	7B	5B	7B	5B	7B	5B	5B	7B	5B	7B
Indent 24	5C	7C	5C	7C	5C	7C	5C	7C	5C	7C	5C	5C	7C	5C	7C
Indent 24 Underline	5D	7D	5D	7D	5D	7D	5D	7D	5D	7D	5D	5D	7D	5D	7D
Indent 28	5E	7E	5E	7E	5E	7E	5E	7E	5E	7E	5E	5E	7E	5E	7E
Indent 28 Underline	5F	7F	5F	7F	5F	7F	5F	7F	5F	7F	5F	5F	7F	5F	7F

NOTE: All indent codes (second byte equals 50h-5Fh, 70h-7Fh) assign white as the color attribute.

7. DATA REJECTION

The receiver should provide an effective procedure to verify data.

A receiver will reject data for two reasons:

1. The data is invalid, or
2. the data is directed to the data channel or field not selected by the user.

Invalid data is any data that:

- fails to pass a check for odd parity, or
- which, having passed the parity check, is assigned no function.

If a print character fails to pass a check for parity, a solid block (7Fh) should be displayed in place of the failed character. In addition, valid data can be corrupted in many ways and may not be suitable for display. For example, repeated fields, skipped fields and altered field sequences are all possible from consumer video equipment and might present meaningless captions.

The receiver will ignore data rejected due to being directed to a deselected field or channel. However, this will not cause the display to be disabled.

8. AUTOMATIC DISPLAY ENABLE/DISABLE

The receiver shall provide an automatic enable/disable capability to prevent the display of invalid or incomplete data, when the user selects the Caption Mode. The display should automatically become enabled after the receiver verifies the data as described in the previous section.

The display will be automatically disabled when there is a sustained detection of invalid data. The display will be re-enabled when the data verification process has been satisfied once again.

GLOSSARY OF TERMS

USED TO DESCRIBE CAPTION DECODER SPECIFICATIONS

BASE ROW - The bottom row of a roll-up display. The cursor always remains on the base row. Rows of text roll upwards into the contiguous rows immediately above the base row.

BOX - The area surrounding the active character display. In Text Mode, the box is the entire screen area defined for display, whether or not displayable characters appear. In Caption Mode, the box is dynamically redefined by each caption and each element of displayable characters within a caption. The box (or boxes, in the case of a multiple-element caption) includes all the cells of the displayed characters, the non-transparent spaces between them, and one cell at the beginning and end of each row within a caption element in those decoders that use a solid space to improve legibility.

CAPTION WINDOW - The invisible rectangle which defines the top and bottom limits of a roll-up caption. The window can be 2 to 4 rows high. The lowest row of the window is called the base row.

CELL - The discrete screen area in which each displayable character or space may appear. A cell is one row high and one column wide.

COLUMN - One of 32 vertical divisions of the screen, each of equal width, extending approximately across the full width of the "Safe Title Area" as defined by SMPTE Recommended Practice #27.3 - 1989. Two additional columns, one at the left of the screen and one at the right, may be defined for the appearance of a box in those decoders which use a solid space to improve legibility, but no displayable characters may appear in those additional columns. For reference, columns may be numbered 0 to 33, with columns 1 to 32 reserved for displayable characters.

DISPLAYABLE CHARACTER - Any letter, number or symbol which is defined for on-screen display.

DISPLAY DISABLE - To turn off the display of captions or text (and accompanying background) at the receiver, rather than through codes transmitted on line 21 which unconditionally <u>erase</u> the display. The receiver may disable the display because the user selects an alternate mode, e.g. TV Mode, or because no valid line 21 data is present.

DISPLAY ENABLE - To allow the display of captions or text when they are transmitted on line 21 and received as valid data. For display to be enabled, the user must have selected Caption Mode or Text Mode, and valid data for the selected mode must be present on line 21.

ELEMENT - In a pop-on or paint-on style caption, each contiguous area of cells containing displayable characters and non-transparent spaces between those characters. A single caption may have multiple elements. An element is not necessarily a perfect rectangle, but may include rows of differing widths.

ERASE DISPLAY - In Caption Mode, to clear the screen of all characters (and accompanying background) in response to codes transmitted on line 21. (The caption service provider can accomplish the erasure either by sending an Erase Displayed Memory command or by sending an Erase Non-Displayed Memory command followed by and End of Caption command, effectively making a blank caption "appear".) Display can also be erased by the receiver when the caption memory erasure conditions are met, such as the user changing TV channels.

ROW - One of 15 horizontal divisions of the screen, extending across the full height of the "Safe Title Area" as defined by SMPTE Recommended Practice #27.3 - 1989.

SPECIAL CHARACTERS - Displayable characters (except for "transparent space") which require a two-byte sequence of one non-printing and one printing character. The non-printing byte varies depending on the data channel. Regular characters require unique one-byte codes which are the same in either data channel.

TEXT - When written with an upper-case "T", refers to the Text Mode. When written with a lower-case "t", refers to any combination of displayable characters.

TRANSPARENT SPACE - Transmitted as a special character, it is a one-column-wide space behind which program video is always visible (except when a transparent space immediately precedes or follows a displayable character and a solid box is needed to make that character legible).

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